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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~86~~ 4

NATHANIEL WILSON, ADMINISTRATOR, ETC., OF HORATIO AMES, DECEASED, PLAINTIFF IN ERROR,

vs.

JOSEPHINE C. ARRICK, ADMINISTRATRIX OF CLIFFORD ARRICK, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 11, 1880.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 88.

NATHANIEL WILSON, ADMINISTRATOR, ETC., OF HORATIO AMES, DECEASED, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 Supreme court of the District of Columbia.

NATHANIEL WILSON, ADMINISTRATOR WITH THE will annexed of Horatio Ames, deceased,
v.
CLIFFORD ARRICK.
} At law. No. 14380.

THE RECORD.

Plaintiff's declaration.

The plaintiff sues the defendant—

1. For that the defendant, on the 11th day of April, 1871, at the city of Washington, in the District of Columbia, collected from the United States the sum of twenty-five thousand dollars ($25,000) due to the estate of Horatio Ames, deceased, in consideration whereof he then and there promised to pay over the same to said estate, but paid over only the sum of fifteen thousand dollars ($15,000), and the remainder, ten thousand dollars ($10,000), he has detained from said estate, and does now refuse to pay to the plaintiff.

2. For that the defendant, on the 6th day of January, 1873, at the city of Washington, in the District of Columbia, collected from the United States the sum of twenty-nine thousand and nine hundred and fifty-five dollars ($29,955) due to the estate of Horatio Ames, deceased, in consideration whereof he then and there promised to pay over the same to said estate, but has not paid the same, nor any part thereof, and does now refuse to pay the same to the plaintiff.

3. For that the defendant, on the 3d day of May, 1873, at the city of Washington, in the District of Columbia, received from Charlotte L. Ames, then administratrix with the will annexed of Horatio Ames, deceased, the sum of thirty-three thousand five hundred and seventy-four $\frac{36}{100}$ dollars, ($33,574.36), which sum was taken from funds held by her as such administratrix, and known to the defendant to be funds so held by her, and which said sum of money the defendant has ever since unjustly detained, and does now refuse to pay to the plaintiff.

4. For money received by the defendant for the use of the plaintiff; and for money lent by the plaintiff to the defendant; and for money found to be due from the defendant to the plaintiff on account stated between them, according to the bill of particulars hereto annexed.

And the plaintiff claims $39,955, with interest on $10,000 from the 11th day of April, 1871, and on $29,955 from the 6th day of January, 1873, besides costs of suit.

STANTON & WORTHINGTON,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

STANTON & WORTHINGTON,
Attorneys for Plaintiff.

2 *Bill of particulars.*

Clifford Arrick to estate of Horatio Ames, deceased, Dr.

April 11, 1871.	To amount collected by you from United States	$10,000
January 6, 1873.	To amount collected by you from United States	29,955
		$39,955

Filed July 2,.1875.

In the supreme court of the District of Columbia.

NATHANIEL WILSON, ADMINISTRATOR OF HORATIO AMES, pl'ff,
vs.
CLIFFORD ARRICK, DEF'T,
} At law. No. 14380.

The President of the United States to the defendant, greeting:

You are hereby commanded to appear in this court on the first day of its special term occurring twenty days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief justice.

[SEAL.] R. J. MEIGS, *Clerk*,
By JOB. BARNARD, *Ass't Clerk.*

3 NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

STANTON & WORTHINGTON.

On back:

Issued July 2, 1875.

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant, the 6th day of July, 1875.

A. SHARP, *Marshal.*
GRAVES.

JULY 6, '75.

Defendant's pleas.

1. The defendant says that he did not agree as alleged.
2. He further says that he did not promise as alleged.
3. And for a further plea, that he never was indebted as alleged.
4. And for a further plea to the first count of the plaintiff's declaration, the defendant says that the alleged cause of action did not accrue within three years before this suit.

4 5. And for a further plea the defendant says that the money in the declaration mentioned was duly collected by Charlotte L. Ames, the former administratrix with the will annexed of the estate of the late

Horatio Ames; and that the amounts in said declaration, claimed without right to be detained by the defendant, were paid to him by the said Charlotte L. Ames, as administratrix with the will annexed aforesaid, in good faith, for services rendered to the said Horatio Ames in his life-time and to his estate.

6. And for a further plea the defendant says that the plaintiff is the administrator de bonis non cum testamento annexo of the said Horatio Ames, and as such he has no right to proceed against the defendant to recover the amount claimed in the declaration, because the same has been duly administered by the said Charlotte L. Ames, as administratrix with the will annexed of the said Horatio Ames.

JAS. S. EDWARDS,
ROSS & DEAN,
Def't's Att'ys.

Filed September 7th, 1875.

In the supreme court of the District of Columbia.

NATHANIEL WILSON, ADM'R, &C., *v.* CLIFFORD ARRICK. } At law. No. 14380.

The plaintiff joins issue upon the defendant's pleas.

STANTON & WORTHINGTON,
Att'ys for Plaintiff.

Filed September 9, 1875.

NATHANIEL WILSON, ADM'R OF HORATIO AMES, pl'ff, *v.* CLIFFORD ARRICK, DEF'T. } At law. No. 14380.

Now comes here Mr. Worthington, attorney, and suggests the death of the defendant, and the same is not denied.

Nov. 1, 1875.

1876. April 22. Summons issued to Mrs. Josephine C. Arrick, adm'x of defendant.

1876. April 25. Summons served on Josephine C. Arrick, adm'x of def't.

5 PROCEEDINGS BEFORE THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING A CIRCUIT COURT AND SPECIAL TERM IN AND FOR SAID DISTRICT, COMMENCING THE 3RD MONDAY, 21ST DAY, OF OCTOBER, A. D. 1878.

MONDAY, *October* 21, 1878.

By order of Chief Justice Cartter, one of the justices of said court, presiding, the court is opened by proclamation of the marshal, pursuant to order of court.

WEDNESDAY, *Nov.* 20, 1878.

Session resumed pursuant to adjournment, Cartter, chief justice, presiding.

NATHANIEL WILSON, ADM'*r*, &C., OF HORATIO AMES, pl'ff,
vs.
M. JOSEPHINE C. ARRICK, ADM'X OF CLIFFORD ARRICK, def't.
At law. No. 14380. Cal., 96.

6 Now comes here as well the plaintiff as the defendant, by her attorneys, Messrs. Edwards & Barnard and Davidge, and a jury of good and lawful men of this district, to wit, James Goddard, W. Scott Chew, Edward C. Younger, James F. Oyster, William H. Covington, Nicholas B. Brooks, John Cammack, John T. Lewis, Henry J. Crier, John E. Prigg, Charles Graff, and John Gass, who, being duly sworn to try the issue above joined, are respited until the meeting of the court tomorrow.

THURSDAY, *November* 21, 1878.

Session resumed pursuant to adjournment, Cartter, chief justice, presiding.

NATHANIEL WILSON, ADM'*r*, &C., OF HORATIO AMES, pl'ff,
vs.
M. JOSEPHINE C. ARRICK, ADM'X OF CLIFFORD ARRICK, def't.
At law. No. 14380. Cal., 96.

7 Now come here again the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is heard, are again respited until the meeting of the court tomorrow.

FRIDAY, *November* 22, 1878.

Session resumed pursuant to adjournment, Cartter, chief justice, presiding.

NATHANIEL WILSON, ADM'*r*, &C., OF HORATIO AMES, pl'ff,
vs.
M. JOSEPHINE ARRICK, ADM'X OF CLIFFORD ARRICK, def't.
At law. No. 14380. Cal., 96.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say they find the issue aforesaid in favor of
8 the defendant. Therefor it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against said plaintiff the costs of her defence, taxed at $, and have execution thereof.

In the supreme court of the District of Columbia.

NATHANIEL WILSON, ADMINISTRATOR ESTATE of Horatio Ames,
v.
JOSEPHINE ARRICK, ADMINISTRATRIX OF ESTATE of Clifford Arrick.
No. 14380. At law.

The plaintiff moves the court, if it shall finally decide that the plaintiff is not entitled to have the instruction, of which a copy is hereto appended, incorporated in his bill of exceptions in the case, as granted by the court without qualification, and excepted to by plaintiff's counsel, to set aside the verdict in this case on the ground that the paper containing such unqualified instruction as written by Mr. Davidge, of counsel for defendant, was by him handed to the jury before they retired to consider said case, and was by the jury taken to their room and read, and believed to be the instruction of the court.

A. S. WORTHINGTON,
Of Counsel for Plaintiff.

Take notice that on Saturday next, the 25th inst., at 10 o'clock a. m., or as soon thereafter as counsel can be heard, I will call up the above motion.

A. S. WORTHINGTON,
Att'y for Pl't'ff.

To Messrs. W. D. DAVIDGE and EDWARDS & BARNARD,
Att'ys for Def't.

Service of copy of motion and of affidavits acknowledged this 23d day of Jan'y, 1879.

EDWARDS & BARNARD,
Of Counsel.

"That the legal effect of the receipts given in evidence and signed by Charlotte L. Ames as administratrix, was to invest her with the control of the moneys mentioned in said receipts; and if the said administratrix parted with said control by the endorsement of said receipts, then the pl'ff is not entitled to recover in this action."

9

[SEAL.] MAYHEW PLATER,
Notary Public.
J. W. HAMILTON JOHNSON,
Notary Public.

JAN'Y 23, 1879.

In the Supreme Court of the District of Columbia.

WILSON, ADM'R,
v.
ARRICK.
At law. No. 14380.

I on oath say that I was one of the jurors in the above case, which was tried at the present term of the court; that after the evidence was closed

the jury had a paper, which paper we read and understood to be the instruction of the court to us as to the law of said case. I have to-day seen the original paper, and compared it with the copy which is hereto appended, and find the copy correct.

W. SCOTT CHEW.
JAS. F. OYSTER.

Sworn to and subscribed before me this 23d day of January, A. D. 1879.
[SEAL.] J. W. HAMILTON JOHNSON,
Notary Public.

In the supreme court of the District of Columbia.

WILSON, ADM'R, }
v. } At law. No. 14380.
ARRICK. }

I on oath say that I was one of the jurors in the above case, which was tried at the present term of the court; that after the evidence in the case was closed the jury had with them in the jury-room a paper, of which the annexed is a true copy. I have this day compared this paper with the appended copy, and know the copy to be correct.

J. GODDARD.

Sworn and subscribed before me this twenty-third day of January, 1879.
[SEAL.] MAYHEW PLATER,
Notary Public.

9½ SATURDAY, *Jan'y* 25, 1879.

Session resumed pursuant to adjournment. Cartter, chief justice, presiding.

NATHANIEL WILSON, ADM'X, PL'FF, }
vs. } At law. No. 14380.
CLIFFORD ARRICK, EX'S, DEF'T. }

Now again comes here the plaintiff and tenders to the court here his bills of exceptions to the ruling of the court on the trial of this case, and prays that they may be duly signed, sealed, and made a part of the record, which is done accordingly.

In the supreme court of the District of Columbia.

NATHANIEL WILSON, ADM'*x*, &C., }
vs. } No. 14380. At law.
CLIFFORD ARRICK. }

The plaintiff moves the court to grant a new trial in this case upon bill of exceptions taken at the trial.

WORTHINGTON & HEALD,
Att'y for Pl'ff.

Filed Nov. 29, 1878.

10 In the supreme court of the District of Columbia.

NATHANIEL WILSON, ADM'R D. B. N. OF HORATIO AMES, *v.* JOSEPHINE ARRICK, ADM'X OF CLIFFORD ARRICK.	No. 14380.	At law.

Plaintiff's bill of exceptions.

At a trial of this cause, the plaintiff, to maintain the issue on his part joined, read in evidence the first and only accounts of Charlotte L. Ames, administratrix of Horatio Ames, filed in this court, holding probate jurisdiction, and also Exhibit A, and vouchers numbered 2, 3, and 4, referred to in said account, which account, exhibit, and vouchers are accounts marked "A 1" and "Exhibit A," and vouchers marked "2," "3," and "4," filed herewith.

The plaintiff further read in evidence the following record of the proceedings of said court in relation to said account, and also in relation to removal of said administratrix and the appointment of the plaintiff as administrator d. b. n. marked "B" and "C," and filed herewith.

And further showed that the plaintiff accepted said office, and duly qualified therein before the bringing of this suit. The plaintiff then gave evidence tending to show that Horatio Ames died in January, 1871, and that among his assets was a large claim against the United States for the manufacture of cannon; that Oliver Ames was the brother of Horatio Ames, and owned in whole or in part the said claim, although the legal title thereto was in Horatio Ames, the contract with the Government, in which the claim originated, having been made with him; that soon after the death of said Horatio Ames said Oliver Ames and said Charlotte L. Ames were appointed administrators of his estate in Connecticut, where he resided at the time of his death; that subsequently a will of Horatio Ames was discovered, the executors under which declined to act, and said Charlotte L. Ames was thereupon appointed administratrix with the will annexed, both in Connecticut and the District of Columbia; that on behalf of Oliver Ames proceedings were begun both in Connecticut and in said District for her removal, which were successful, and from this action of the courts appeals were taken by her, pending which the payment of $59,000 mentioned in said Exhibit A was made to said Oliver Ames upon his giving a bond to Charlotte L. Ames in the penal sum of $120,000, conditioned for the payment of said $59,000 with interest in case the courts of Connecticut should decide her to be the lawful administratrix; that upon said appeals the removal of said Charlotte L. Ames was reversed, and she was reinstated in both jurisdictions.

That said vouchers, numbered 2, 3, and 4, were entirely in the handwriting of Clifford Arrick, the intestate of the defendant; and that the charges made by the said Clifford Arrick in said vouchers were fraudulent and excessive, and that the said Arrick had no agreement with the said Horatio Ames entitling the said Arrick to the said sums of money or to any part thereof. And the plaintiff further gave in evidence to the jury testimony tending to show that the whole sum of $39,955, the subject-matter of this suit, with which said Charlotte L. Ames, as administratrix, charges

herself in her said accounts, was paid by the United States to said Clifford Arrick, as attorney for the said Charlotte L. Ames, administratrix, and that said Arrick kept control of said funds, and stated, on or about June 19, 1874, that he intended to keep control thereof "until the end of this business," referring to the litigation then pending in the probate branch of this court.

11 Thereupon the plaintiff offered to prove, by the deposition of the said Oliver Ames, taken in this cause, transactions on the part of the intestate of the defendant with and statements by him to the said Oliver Ames tending to show that the said charges were unconscionable, but the court excluded said offered evidence as inadmissible; and thereupon the plaintiff, by his counsel, excepts and prays the court to sign and seal this his first bill of exceptions, which is accordingly done before the jury retired this 22d day of November, A. D. 1878.

D. K. CARTTER, [SEAL.]
Chief Justice.

After the evidence mentioned in the foregoing bill of exceptions, made part hereof, the plaintiff rested; and thereupon the defendant gave evidence tending to show that her said intestate, Clifford Arrick, acted as attorney for the said Horatio Ames in his life-time under an agreement with him, and also after his death for the said Charlotte L. Ames, his administratrix, in the prosecution and recovery of the said claim, and otherwise; and that the charges contained in the said vouchers numbered 2, 3, and 4 were just and reasonable. The defendant then gave evidence tending to show that he duly accounted with said administratrix, and further gave in evidence the following documents produced from the office of the Fourth Auditor of the Treasury of the United States, where such vouchers are properly filed and kept after the payment thereof, marked "D," and filed herewith.

The signatures of Charlotte L. Ames, Oliver Ames, and Clifford Arrick upon the said documents were admitted by the plaintiff to be genuine.

Thereupon the defendant prayed the court to instruct the jury as follows: "That the legal effect of the receipts given in evidence and signed by Charlotte L. Ames, as administratrix, was to invest her with the control of the moneys mentioned in said receipts, and if the said administratrix parted with said control by the endorsement of said receipts, then the plaintiff is not entitled to recover in this action."

And the plaintiff excepted to the granting of said prayer.

Which prayer the court granted in connection with the following charge to the jury:

"Gentlemen of the jury: If you find from the testimony in this case that Mrs. Ames, administratrix of the estate of Horatio Ames, deceased, received this fund from the Government for the purpose of administration, and that after receiving it she wasted it upon Arrick, or anybody else, the plaintiff in this case is not entitled to recover; it would be a case of the administration of the assets, and it don't survive to the administrator de bonis non to prosecute."

Mr. WORTHINGTON (of counsel for plaintiff). "Yes; but your honor goes further, and says that this receipt is conclusive evidence."

The COURT. "No; I say that this receipt, in the absence of impeachment, is evidence that she received the money; that the fact that she received it through another hand don't change the matter at all. If you

sent a black boy for it, or a white boy for it, with her sign-manual, he merely became the carrier of the fund, and it was her act, and not the act of the servant. You treat Arrick as a debtor."

And thereupon the plaintiff excepts to said charge, and prays
12 the court to sign and seal this his second bill of exceptions, which is accordingly done before the jury retires this 22d day of November, A. D. 1878.

D. K. CARTTER, [SEAL.]
Ch'f Justice.

A 1.

Charlotte L. Ames, administratrix c. t. a. of the estate of Horatio Ames, deceased, in account with said estate, Dr.

April 11, 1871, to amount paid by the United States as of this date, and as per exhibit herewith filed, marked "A," to wit: $25,000, less $15,000 thereof accounted for to Oliver Ames, as administrator on said estate in Connecticut, May 8, 1871		$10,000 00
January 6, 1873, to amount paid by the United States as of this date, and as per exhibit herewith filed, marked "A," being the balance in full of all accounts, as per receipt given		29,955 00
		39,955 00

CONTRA.—CR.

April 4, 1873, by cash paid, as per voucher No. 1	$125 00	
May 2, 1873, by cash paid, as per voucher No. 2	5,000 00	
May 2, 1873, by cash paid, as per voucher No. 3	14,324 36	
May 2, 1873, by cash paid, as per voucher No. 4	14,250 00	
May 2, 1873, by adm'x commissions, 10 per cent	3,995 00	
		37,694 36
		$2,260 64

STATE OF NEW YORK,
County of Monroe ss:

Charlotte L. Ames, administratrix with the will annexed on the estate of Horatio Ames, deceased, being duly sworn, says that the above account contains, according to the best of her knowledge and belief, a full and true account of all receipts and disbursements made by her as such administratrix on account of the estate of said deceased, under the grant of administration to her within and for the city and county of Washington, District of Columbia, and of all moneys belonging to said estate which has come to

her hands, or which has been received by any other person by the order or authority of this deponent; and that she does not know of any error or omision in said account to the prejudice of any of the parties interested in said estate; and this deponent further says that the only remaining property or claim within said city and county belonging to said estate, of which she has knowledge, is one for $59,000, with interest from December 21, 1871, and for which she has a suit pending in the Supreme Court of the District of Columbia.

CHARLOTTE L. AMES.

Subscribed and sworn to before me this —— day of May, 1873.
[SEAL.] W. D. STUART, *Surrogate.*

13 EXHIBIT A.

The United States in account with the estate of Horatio Ames, deceased, Dr.

July 15, 1869, to amount due for ordnance manufactured and supplied by said deceased, under contract with the Navy Department, as follows, to wit:

For five w't-iron cannon and certain incidental expenses connected with their inspection, delivery, and proof, as per report of the Naval Ordnance Board convened under the authority of the Hon. Secretary of the Navy, March 15, 1869	$72,038 60
April 8, 1871, for five w't-iron cannon, manufactured and supplied under said contract, as per supplemental agreement with the administrators of this date	71,205 00
January 6, 1873, for three experimental w't-iron cannon, "with steel tubes inserted," manufactured and supplied by said deceased, under the recommendation of Commodore T. A. Hunt, of March 15, 1866, and as per final settlement-sheet and receipt of this date	42,750 00
Total sum due on said contracts	$185,993 60

CONTRA.—CR.

March 22, 1870, by cash paid the deceased	$30,000 00	
July 23, 1870, by cash paid the deceased	42,038 60	
April 11, 1871, by cash paid Clifford Arrick, attorney	25,000 00	
December 21, 1871, by cash paid Oliver Ames, as adm'r on bond, &c	59,000 00	
January 6, 1873, by cash paid Clifford Arrick, attorney, &c	29,955 00	
		185,993 60

[Voucher No. 2.]

The estate of Horatio Ames, deceased, in account with Clifford Arrick, Dr.

April 11, 1871, to amount due from said estate, payable out of the proceeds of its claim against the United States so

soon as received, as per agreement of the deceased, and on account of expenses incurred and other incidental and proper charges in "the Dyer court of inquiry case," prosecuted by the deceased and others, in 1868–'9, at Washington City..... $5,000 00

CITY AND COUNTY OF WASHINGTON,
District of Columbia, ss:

Clifford Arrick, the owner of the foregoing account and claim, deposes and says that the said account as stated is just and true, and that he hath not received any part of the money stated to be due, or any security or satisfaction for the same; that the same is justly due and owing to this deponent, out of the proceeds of said claim when received, as per agreement with the deceased, and that there are no offsets against the same, to the knowledge of this deponent.

CLIFFORD ARRICK.

Sworn to before me by the said Clifford Arrick this 6th day of May, 1873.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS, *Ass't Clerk.*

14 OFFICE OF REGISTER OF WILLS, *June* 4, 1873.

DISTRICT OF COLUMBIA,
Washington County, to wit:

This day appeared Clifford Arrick, and made oath on the Holy Evangels of Almighty God that the annexed account, as stated, is just and true, and that he has not received any part of the money stated to be due, or any security or satisfaction for the same.

Test:

A. WEBSTER,
Register of Wills.

Received, Washington City, D. C., May 2, 1873, of Charlotte L. Ames, administratrix c. t. a. of the estate of Horatio Ames, deceased, five thousand dollars in full of the annexed claim—$5,000.

CLIFFORD ARRICK.

[Voucher No. 3.]

The estate of Horatio Ames, deceased, to Clifford Arrick, Dr.

April 8, 1871, to amount of commissions and expenses incurred in the collection of one hundred and forty-three thousand two hundred and forty-three dollars and sixty cents (143,243.60) from the United States upon a contract of the deceased with the Navy Department, ten per centum of the sum collected, and being payable out of the proceeds thereof, as per agreement with the deceased, dated February 25, 1869..... $14,324 36

L. Stanton, as solicitor for Oliver Ames, for leave to file certain exceptions to the account heretofore filed by Charlotte Ames, administratrix c. t. a. of said estate—

It is thereupon ordered this 5th day of August, 1873, that leave be, and hereby is, given to file said exceptions.

And it is further ordered that said account and exceptions be, and hereby are, referred to John Selden, esq., as special auditor, to examine and report upon said account and exceptions, and that before him proofs be adduced by the respective parties to sustain said account and to sustain said exceptions thereto; and said auditor, in his examination of said matter, is to consider the burden of proof as being upon said administratrix to establish affirmatively and specifically said account.

By the court.

Test:

A. WEBSTER, *Reg. of Wills.*

In the supreme court of the District of Columbia, holding a special term for probate business.

IN THE MATTER OF THE ESTATE OF HORATIO AMES, DECEASED. } Filed August 5, 1873.

Oliver Ames, of North Easton, Massachusetts, a creditor of said decedent, who has duly proved his claim against said estate before the proper court, at the domicile of the decedent, in an amount exceeding the assets of said estate, which estate is insolvent, asks leave of the court to file the following exceptions to the account filed in this court by Charlotte L. Ames, as administratrix c. t. a. of said decedent:

I. To the item whereby said accountant charges herself with $10,000 as paid on April 11, 1871, by the United States, "to wit, $25,000, less $15,000 accounted for to Oliver Ames, as administrator on said estate in Connecticut."

Because said sum was not collected or received by said accountant as administratrix c. t. a. of said estate appointed by this court. But said sum must be accounted for by her at the principal administration at the domicile of said decedent.

II. To the item whereby said accountant charges herself with $29,955 as paid by the United States.

Because said sum was paid for property belonging to this exceptor, to whom, and not to said estate, said sum belongs.

III. To the item whereby said accountant claims credit and allowance for $125 for cash paid, as per voucher No. 1, filed with said account.

Because the charge therein made is too high.

IV. To the item whereby said accountant claims credit and allowance for $5,000 for cash paid, as per voucher No. 2, filed with said account.

Because said voucher is too general, vague, and indefinite, and is for an exorbitant amount, and is an expenditure unauthorized by law or any agreement made by said decedent. Nor did said Horatio Ames have power or authority to contract for the payment of the charges included in said voucher from the funds with which said accountant has charged herself as assets of said estate.

V. To the item whereby said accountant claims credit and allowance for $14,324.36 as cash paid, per voucher No. 3.

17 1. Because said voucher is too general, vague, and indefinite.

2. Because the commissions and expenses therein charged are exorbitant.

3. Because said commissions and expenses were unauthorized by any agreement made by said Horatio Ames.

4. Because said Horatio Ames had no power or authority to make any agreement for the payment of said commissions and expenses from the funds with which said accountant has charged herself as assets of said estate.

VI. To the item whereby said accountant claims credit and allowance for $14,250 cash paid, as per voucher No. 4, filed with said account.

1. Because said voucher is too general, vague, and indefinite.

2. No part of the cash payment indicated by said voucher was due, or just or proper to be made.

3. Said payment was not authorized by any agreement by or with said Horatio Ames.

4. Said Horatio Ames had no power or authority to agree that said payment, or any part thereof, should be made from the proceeds of the three (3) steel-cone cannon in said voucher mentioned, or from any of the funds with which said accountant has charged herself as assets of said estate.

VII. To each and all of said items above mentioned whereby said accountant claims credit and allowance.

Because they were not proved in proper form or in due season.

VIII. To each and all of said items above mentioned whereby said accountant claims credit and allowance.

Because said estate is insolvent, and creditors in the District of Columbia, wherein the administration of said estate is ancillary, ought to be paid, not in full but *pro rata* with other creditors of said estate.

IX. To each and all of said items above mentioned whereby said accountant claims credit and allowance.

Because the money wherewith said accountant has charged herself as assets of said estate, having been paid by the United States on account of debts due by the United States, cannot be treated as merely local assets within the jurisdiction of the ancillary administration of said estate in the District of Columbia, so as to give creditors in said District preference to other creditors who have proved their claims before the principal administration, or so as to exclude creditors who have proved their claims before the principal administration.

X. To the commissions on $39,955, at the rate of 6½ per cent., for which in said account said accountant claims credit and allowance.

Because said accountant cannot lawfully claim commissions upon said sum, and because said percentage is excessive.

EDWIN L. STANTON,
Solicitor for Oliver Ames.

AUGUST 5, 1873.

18 [Office register of wills.—Filed Mar. 17, 1874.—District of Columbia.]

In the supreme court of the District of Columbia, the 4th day of March, 1874.

IN THE MATTER OF)
THE ESTATE OF HORATIO AMES, DECEASED.)

The undersigned, to whom, on the 5th day of August, 1873, were referred by order of this court the account of the administratrix c. t. a. of the said decedent, together with the exceptions filed to the said account, as a special auditor to examine and report upon the same, respectfully prays the court that he may be relieved and discharged from further consideration of the matters involved in such case.

And, as in duty bound, your petitioner will ever pray, &c.

JOHN SELDEN.

[Office register of wills.—Filed March 17, 1874.—District of Columbia.]

IN THE MATTER OF)
ESTATE, HORATIO AMES, DECEASED.)

John Selden, esq., heretofore appointed special auditor in the above matter, having returned the papers therein, and requested to be relieved from the said appointment of auditor, it is this 17th day of March, 1874, ordered that James G. Payne, esq., be, and he is hereby, substituted as such special auditor in place of said John Selden, and the provisions of the original order of reference to said John Selden will in all respects be carried out as to the audit and examination of said matter by said James G. Payne special auditor, under this appointment.

By the court.

O. B. OLIN.

Test:

A. WEBSTER, *Reg. of Wills.*

Auditor's report.

In the supreme court of the District of Columbia.

IN THE MATTER OF) In special term for pro-
THE ESTATE OF HORATIO AMES, DECEASED.) bate.

Exceptions to the account of Charlotte L. Ames, administratrix c. t. a.

The first account of the administratrix c. t. a. was filed in June, 1873, and exceptions of Oliver Ames to the said account were filed on
19 the 5th day of August, 1873. On the same day the account and the exceptions were referred to John Selden, esq., as special auditor, to examine and report upon said account and exceptions. The order of reference further provided, "that before the special auditor proof be adduced by the respective parties to sustain said account, and to sustain said exceptions thereto," and that "said auditor in his examination of

said matter, is to consider the burden of proof as being upon said administratrix to establish affirmatively and specifically said account."

On the 17th of March, A. D. 1874, upon the request of Mr. Selden, he was relieved from the said appointment of special auditor, and I was substituted in his place as such auditor, under the provisions of the said original order of reference to him.

After due notice to Clifford Arrick, esq'r, attorney & counsel for the accountant, and Messrs. Stanton & Worthington, counsel for the exceptant, the hearing was commenced before me, on the 21st of May, 1874, and continued from time to time until the 25th of May, 1875. The adjournment to the latter date was fixed on the 11th of May, 1875, at the instance of the counsel for the accountant.

No further proof being then offered on either side, I notified counsel that I would receive any suggestion or argument they desired to submit. This notice to Mr. Arrick, counsel for the accountant, was mailed to him, at his residence in this city, on the 26th of May, 1875. No argument or brief was submitted; and on the 15th of June, 1875, I proceeded to make up my report.

The witnesses who testified before were Clifford Arrick, Isaac P. Tice, Oliver Ames, and James O. Clephane. Mr. Arrick testified at length as to certain agreements between the deceased and himself, and services rendered by him to the deceased, and to the estate in the collection of certain claims against the Government.

Mr. Tice testified to a personal acquaintance with Horatio Ames in his life-time, and some general knowledge of his having business transactions with the Government, and of Mr. Arrick acting as his attorney.

Mr. Oliver Ames, the exceptant, testified as to the ownership of the property which was sold to the Government, and over the proceeds of which this controversy has arisen, and as to his transaction and negotiations with the administratrix and Mr. Arrick.

Mr. Ames also submitted a transcript of a judicial proceeding in the courts of Connecticut, in which the question of the ownership of the property was at issue and in part adjudicated. Sundry letters and other documents were also submitted on both sides, and are duly marked as exhibits and returned with the testimony.

The history of this matter substantially as shown by the proof is as follows:

Horatio Ames, some years prior to his death, had some kind of an agreement or contract with the Navy Department to furnish eleven wrought-iron cannon, for which the price of one dollar per pound was to be paid. No written evidence of this contract or agreement was produced before me, nor does it clearly appear when any of these guns were first finished and delivered, or ready for delivery, to the Department. It does appear that five (5) of these guns were paid for in the life-time of Horatio Ames, the money, $72,023.60, being paid to Horatio Ames and by him transferred to Oakes Ames, his brother, during the year 1870.

On the 25th of February, 1869, Horatio Ames employed Clifford Arrick as counsel in the matter of his claims for wrought-iron guns furnished to the Navy Department, as appears from the correspondence annexed to voucher No. 3 to the account. Mr. Arrick testifies that upon his appli-

cation a board of naval officers was convened to report upon the character of this claim and the liability of the Government, and that the board reported favorably upon the claim. Although these proceedings were admittedly matters of record, no part of the record, either the application, the order, the proceedings, or report of the board or the action of the Department thereon, was produced before me. (The counsel for the exceptant specially objected to this parol testimony.) Mr. Arrick also testified (under the same objection) that the board prescribed certain tests for the six guns, which, in his opinion, were unnecessarily severe, and that he determined to bring suit in the Court of Claims, which was done in Horatio's life-time.

Horatio Ames died in January, 1871. After his death Oliver Ames and Charlotte L. Ames were appointed administrators upon the estate in Connecticut. A suit for the price of the six guns had been commenced in the Court of Claims in the life-time of Horatio, and was discontinued
21 or abandoned after his death. Mr. Arrick testified that he drew the petition in that suit, obtained copies of papers from the Department, and put the record in order. Depositions were taken at Falls Village, Connecticut, by other parties. Soon after the death of Horatio Ames, an agreement was made with the Navy Department that the administrators of Horatio should proceed to finish up the six guns, and that an immediate payment should be made by the Department on account of the same of $25,000. This $25,000 was paid to Clifford Arrick, esq., who transmitted to Oliver Ames $15,000, and retained the balance or paid it to Charlotte L. Ames.

Subsequently a will of Horatio Ames was discovered, the executors under which declined to act, and Charlotte L. Ames was appointed administratrix with the will annexed, in Connecticut and here. Proceedings to remove her were commenced in both places, and were in the first instance successful. She was removed and Oliver Ames appointed. Appeals were taken from this action of the court, pending which a payment of $59,000 was made by the Department to Oliver Ames upon his giving bonds to indemnify the Department against any loss by reason of such payment. This appears to have been the balance due upon the six gun matter. On the appeals above referred to, taken by Mrs. Ames, her removal from office of administratrix was reversed and she reinstated in that position. New proceedings were commenced to remove her, pending which, in Connecticut, Mrs. Ames and William H. Barnum were appointed co-administrators with the will annexed. The $59,000 received by Oliver Ames passed into the hands of Mr. Barnum, as administrator, and a proceeding was instituted by Oliver Ames in Connecticut against Charlotte L. Ames and William H. Barnum to settle the question of ownership and to decide to whom that $59,000 properly belonged. Then proceedings were commenced in the supreme court of the District of Columbia by Mrs. Ames against Oakes and Oliver Ames, and also against William H. Barnum, to try substantially the same issue. The suit here against Barnum was prosecuted to trial and judgment at the January term of the circuit court, 1875, for the defendant. This suit was number 10598 at law.

In the proceeding in Connecticut the court found Oliver Ames to have been the equitable owner of the manufactory, and of the guns fur-
22 nished to the Government, and of the proceeds of these guns, and directed the $59,000 to be paid to him. A transcript of the pro-

ceedings and judgment in this cause is filed herewith, and marked "Exhibit O. A. 8," and returned with this report.

In the life-time of Horatio Ames, in addition to the eleven guns already mentioned, it appears that he made efforts to sell to the Government three steel-core guns, as they were called. These three steel-core guns were at the works of Oliver Ames, and were not sold during the life-time of Horatio Ames. After his death Oliver Ames renewed the endeavor to dispose of them to the Government.

In the proof of the six guns last delivered to the Government it appears that one of them failed; whereupon Oliver Ames requested the Government to allow him to substitute one of these steel-core guns in place of the defective one, which was done.

The two remaining steel-core guns were the subject of negotiation with the Government until about the first of January, 1873, when, as testified to by Mr. Arrick, he informed Oliver Ames that he could sell the two steel-core guns to the Government, and that he didn't think any one else could. Oliver Ames, at the request of Mr. Arrick, gave him a letter to the Navy Department, ratifying and confirming whatever arrangement he might make with the Department about these guns. The guns were taken by the Department, and $29,955 was paid to Mr. Arrick therefor on the 6th of January, 1873.

At this time the right to the administration on the estate of Horatio Ames was still in controversy in Connecticut, and other suits growing out of the same matter were pending both there and here.

Oliver Ames testifies that in giving the letter in question to Mr. Arrick it was upon condition that all suits brought by Mrs. Ames in this matter should be discontinued and abandoned, the $10,000 retained by Mr. Arrick out of the first $25,000 received should be returned to Oliver Ames, and an indebtedness to a Mr. Seaman, of New York, should be paid. These conditions do not appear to have been reduced to writing. Mr. Arrick testifies that the only condition annexed to the giving of the letter authorizing him to receive pay for the two steel-core guns was that he should account to Oliver Ames for whatever sum was to be paid to Mr. Seaman.

23 The $29,955 appears to have passed into the possession of Mrs. Ames as administratrix.

It is claimed by Oliver Ames, and established by the proofs, that he was the owner of the works in Connecticut at which all of these guns were manufactured or prepared for the Government; that he manufactured or prepared the guns, and was and is equitably entitled to their proceeds. The judgment of the superior court of Connecticut for the county of Litchfield, although immediately affecting only a part of the proceeds of these guns, to wit, $59,000, really goes to the whole question of the ownership of all these guns and the right to their proceeds, and the decree that Oliver Ames should receive the $59,000, which was within the jurisdiction and reach of that court, is based upon the express ground that the entire ownership of the guns and the equitable right to their proceeds was in Oliver Ames, and that Horatio Ames, in his dealings with the Government, was acting as his (Oliver's) agent.

The accountant charges herself with ten thousand dollars, being part of the sum received from the Government April 11, 1871, of which sum fifteen thousand dollars were transmitted to Oliver Ames. To this item of

charge exception is made, "because the said sum was not received or collected by the said accountant as the administratrix c. t. a., of said estate appointed by this court, but said sum must be accounted for by her at the domicile of the said decedent."

Mrs. Ames, being administratrix c. t. a., under appointment of the court and qualification here, and receiving the money here, so far as appears, may in my judgment properly account for it here as assets of the estate, and need not necessarily carry these assets to Connecticut to account for them there.

The accountant next charges herself with $29,955, the amount paid by the United States January 6, 1873.

The exception to this charge is, "because said sum was paid for property belonging to this exceptant, to whom, and not to said estate, said sum belongs."

This payment was undoubtedly the proceeds of the two steel-core guns, the two preceding payments of $25,000 to Mr. Arrick and $59,000 to Ames, paid for the six guns furnished after Horatio's death, leaving due nothing on the eleven-gun contract. Oliver Ames claimed these
24 two steel-core guns as his own, and such they were, equitably at least. But Oliver Ames allowed Horatio, in his life-time, to deal with Government as a principal and not as an agent. Horatio sold the five guns to the Government as the owner, received the pay as the owner, talked of and treated the six other guns and the three steel-cores as his own, and after his death the Government recognized his legal representatives as the lawfully-authorized parties to complete the contract and receive payment.

It further appears that about the first of January, 1873, the estate of Horatio Ames still claiming the right to the property and its proceeds, as against Oliver Ames, he, Oliver, gave to Mr. Arrick, as the attorney for the administratrix, written authority to the Department to arrange with Mr. Arrick about these two guns, and approving of such arrangement, that the Government bought these guns from Mr. Arrick, as the attorney of the administratrix, and paid him for them, as such attorney.

Whatever equitable claim Oliver Ames might have upon these guns it is clear that he permitted the proceeds of their sale to go into the hands of the administratrix, and cannot now prevent her from treating them as assets of the estate.

Whether Oliver Ames can now hold the estate as his trustee for this fund is a question I need not discuss at this point. It is testified to by Oliver Ames that the giving of the letter of authority to Mr. Arrick was coupled with certain conditions, to be kept and performed on the part of Mrs. Ames, as administratrix, which were not so kept and performed; that if these conditions had been observed he, Oliver, would not have claimed the $29,955.00. I am of the opinion that the charge of this sum is a proper one, and that the exception is not well founded.

These two exceptions cover the one side of the account, and I have allowed both the charges made by the administratrix against herself as proper.

The third exception is to the credit and allowance claimed by the accountant for $125.00 paid to James O. Clephane, "for services rendered by him as special commissioner in matters pertaining to the estate."

The proof before me shows that the services charged for were rendered and the price reasonable, and should be allowed.

25 The next exception is to the credit and allowance claimed by the accountant for $5,000 "paid to Clifford Arrick" on account of expenses incurred, and other incidental and proper charges in the Dyer court of inquiry case, prosecuted by the deceased and others in 1868 and 1869, at Washington City.

It appears that about 1868 a number of parties interested in the manufacture or sale of material for use by the Army and Navy of the United States made and preferred charges against General Dyer, chief of ordnance of the War Department.

Mr. Arrick testifies that he came to Washington about September, 1867, as a witness before the joint select committee on ordnance of the 40th Congress, and that he soon afterwards became identified with the investigation, and was employed for a while by the committee as an expert. Mr. Arrick states that about 1863 he presented for the consideration of the Department some improved projectiles and ammunition for rifled cannon, and that between that date and the fall of 1867 he spent a good deal of time and money in the attempt to convince the Government of the superiority of his projectile. He states that he became acquainted with Mr. Ames and the other parties, who were instrumental in raising the investigation before Congress, in the winter of 1867 and 1868; that the report of the committee gave rise to the Dyer court; that he followed the matter into that court and represented the accusers there; that there were a great many complaints at the Capitol, and the names of some of them which were put upon the record before the court of inquiry were those of Horatio Ames, Norman Wiard, and H. F. Mann; and that while he represented them as their attorney he was so identified with the matter at the Capitol as to occupy the same relation to the case as they did.

Mr. Arrick claims, in his testimony, that he had an agreement or understanding with Horatio Ames that his, Arrick's, expenses, and the expenses of a Mr. Kennon, whom Arrick had assisting him in this inquiry, were to be paid by Horatio Ames, out of the proceeds of his, Ames', claims against the Government, when realized.

He further states that these expenses consisted generally of hotel and board bills, travelling expenses, and printer's bills, and that at one

26 time he and Mr. Ames figured up or estimated their expenses at about five thousand dollars, and that he has not now the memorandum of such calculation.

The proof adduced upon this matter is all parol, and was objected to by the counsel for the exceptant as incompetent.

It does not appear that this proceeding before the Dyer court of inquiry, or the Dyer prosecution, as it is sometimes called, was a matter that affected the claims of Horatio Ames against the Government for guns furnished to the Navy Department, or that it influenced the action of the Government in the final payment of these claims. Nor do I think that any agreement of Horatio Ames to pay the sum charged is sufficiently established.

It appears to me, from all the evidence, that the action of Mr. Arrick, for or with Horatio Ames and the others in this prosecution, was grounded as much upon a common interest in the matter as upon anything else.

Mr. Arrick made no claim upon either of the other prosecutors for his services or expenses in this prosecution, and although Horatio Ames, after the final termination of this prosecution, received from the Government, in the presence of or with the knowledge of Mr. Arrick, payments amounting to over seventy thousand dollars, no claim appears to have been then made by Mr. Arrick for payment or reimbursement to him out of that money of any claim he had against Mr. Ames, or that Mr. Ames offered to make any such *the* payment or reimbursement.

Upon the proof before me I am forced to the conclusion that this claim of $5,000 ought not to be allowed, and that the exception should be sustained. This view of the matter is further strengthened by the consideration that the monies out of which this claim is sought to be collected are the proceeds of property belonging to Oliver Ames, and to which he has an equitable claim.

The next exception is to the claim of credit and allowance for $14,324.36 paid to Clifford Arrick "for commission and expenses incurred in the collection of $143,243.60 from the United States upon a contract of the deceased with the Navy Department, being ten per cent. of the amount collected, and based upon the agreement contained in the letter of February 26, 1869, between Arrick and Horatio Ames, which are attached to voucher No. 3.

It is claimed by Mr. Arrick that the collection of this whole
27 amount was the result of his efforts subsequent to the 25th of February, 1869; that upon his application the claim was referred to a naval board, which reported in favor of the payment of $72,038.60 for the five guns finished, and contingently in favor of the payment of the other six guns. No record proof in this connection has been submitted to me, and it does not sufficiently appear what services Mr. Arrick rendered in securing the allowance and payment of this $72,038.60. It does appear that there was some trouble about appropriations, and that Oakes Ames, who was then a member of Congress, interested himself in this matter, and that when the payments of this sum were made to Horatio he at once transmitted them to Oakes.

Mr. Arrick testifies that Horatio told him that he was indebted to Oakes, and that this sum, which was paid in two installments, would to a small extent overpay that indebtedness. Mr. Arrick states this by way of explanation of the fact that at the time of these payments he took no steps to make or enforce his claim for commissions upon that money. The last of these two payments was made soon after the appropriation was passed by Congress.

From the evidence before me, or from the want of evidence, I am compelled to report against the allowance of the ten per cent. claimed upon this $72,038.60. The insufficiency of proof as to what Mr. Arrick done towards the collection of this money, the fact that the payments were to Oakes Ames, the testimony of Oliver Ames that he did not employ Arrick or authorize his employment, and that his brother, Oakes Ames, was the only person besides Horatio whom he knew as being interested in the matter of procuring these payments—he, Oliver, being the owner of the property for which these payments were made—are among the considerations leading me to this conclusion. This portion of the amount claimed has reference to the five guns which were finished and delivered in the life-time of

Horatio Ames. As to the remaining portion, Mr. Arrick testifies that the Navy Department, or board, prescribed a test or proof for the six guns when they should be finished which he and Horatio Ames deemed unnecessarily severe, and which he endeavored without success to have modified; that he then concluded to bring suit for the price of these six guns in the Court of Claims, and did prepare and file a petition in that court; that he did not take the testimony in that case, but did obtain copies of
28 papers from the Department and prepared the record; that this suit in some way was dropped from the calendar of the Court of Claims, and was, upon his motion, restored, and that after the death of Horatio Ames this suit was discontinued.

The guns were not finished in the life-time of Horatio Ames, but after his death the administrators and Oliver Ames, as the real owner of the claim, signed a paper which is filed in the Navy Department, and a copy of which is in Exhibit O. A. 10, dated May 8, 1871, withdrawing the suit in the Court of Claims and agreeing to accept such sum as might be found due on delivery of the guns when finished.

At the time of this agreement the Department made a payment of $25,000 to Mr. Arrick, apparently as attorney for the then administrators. Of this amount Mr. Arrick transmitted $15,000 to Oliver Ames. Oliver Ames finished up the six guns, and on the 29th of July, 1871, notified the Department that they were ready for proof. The guns were proven and one failed, in place of which, at the request of Oliver Ames, he was allowed to substitute one of three steel-core guns, and in December, 1871, the Department paid to Oliver Ames the balance due upon the six guns, $59,000, taking from him a bond of indemnity as against the claim of the estate of Horatio Ames. This $59,000 was paid to Oakes Ames for Oliver, and went into the hands of Wm. H. Barnum, one of the administrators, and became the subject of suit in the courts of Connecticut, as before stated. After the payment of the $25,000 Oliver Ames, in person or through Oakes Ames, attempted to deal with the Government in regard to these six guns. Mr. Arrick's connection with the matter, and his efforts after that time, were in the interests of Mrs. Ames and adverse to Oliver. The proof does not show that Mr. Arrick either sold these six guns to the Government or procured their payment in such manner as to entitle him to a commission on the whole of their proceeds.

He did file the agreement of the administrators and Oliver Ames of May 8, 1871, and did as attorney receive the payment of $25,000, then made. I think an allowance of ten per cent. on this amount would be a fair compensation for his services in this matter.

It would seem, from the correspondence with the Navy Depart-
29 ment, contained in Exhibit O. A. 10, that Mr. Arrick's interest in the test or proof of these guns was in some measure personal, for in the letter of the Department of April 28th it is charged that "Eureka" "shot (Mr. Arrick's projectile) was being manufactured for these guns," and in Mr. Arrick's reply of May 13, 1871, it is admitted.

I am compelled to report against the whole of this claim, excepting ten per cent. on $25,000.

The next exception is to the claim for credit and allowance of $14,250, paid to Clifford Arrick, and which the voucher states as being "one-third of $42,750, the amount received from the United States on account of three steel-core guns."

Mr. Arrick testified that Horatio Ames, in his life-time, had three steel-core cannons, which he endeavored to sell to the Navy Department, and that he agreed with him (Arrick) that if he could dispose of them to the Government he should have the proceeds of one of them.

These guns were not sold to the Government during the life-time of Horatio, and after his death Oliver Ames, as the owner, directly and repeatedly offered them to the Department. When one of the six guns above mentioned failed in its trial Oliver Ames requested the Department to allow him to substitute one of these steel cores in its stead, which was done, leaving two of the steel-core guns undisposed of.

About the first of January, 1873, Oliver Ames gave to Mr. Arrick, as attorney for Mrs. Ames, administratrix, a letter to the Navy Department, authorizing the sale of these two guns, and ratifying whatever arrangement Mr. Arrick should make with the Department in regard to them. Mr. Arrick did dispose of the guns to the Department for $29,955, and as that amount has gone into the hands of the administratrix nominally I think Mr. Arrick should have been allowed and paid a reasonable sum for his services in the premises.

If the agreement claimed by Mr. Arrick to have been made by Horatio Ames were conclusively established as having been so made I do not think it could be enforced now. Whatever part Mr. Arrick had in the final sale of these guns to the Department was not under an agreement with Horatio Ames. The circumstances were changed, and the pay to which Mr. Arrick is entitled does not rest upon any specific agreement.

It is not necessary to repeat the conflicting theories as to the conditions upon which the authority to Arrick to arrange with the Department for these guns was given.

The measure of compensation ought to be the reasonable value of the services which Mr. Arrick rendered in connection with the sale of the two steel-core guns; and under all the circumstances I think ten per cent. upon the amount realized from the sale would be a fair compensation.

I have to report, therefore, against all of this claim, excepting ten per cent. of $29,955.00, which is $2,995.50.

The last exception is to the allowance of commissions to the administratrix—six and one-half per cent. on the amount received by her, and with which she charges herself.

The proofs in this matter do not develop any sufficient reason for not allowing the ordinary commission, unless it be the fact that Mr. Arrick has claimed, and I have allowed him, attorney fees for the collection of the same moneys. It is possible that a less sum would sufficiently compensate the administratrix for her personal trouble in the management of the estate. But there seems to have been some litigation, entailing, I suppose, expense and trouble upon her, and for which expense she has made no claim of reimbursement. Under all the circumstances, I think that these commissions should be allowed to stand, with the understanding that they shall cover all expenses attending the settlement of the estate on her part, excepting so far as I have allowed fees or commissions to Mr. Arrick in this report.

A portion of the testimony was by agreement taken by a stenographer, whose bills for the same are submitted herewith.

All of the testimony and proceedings before me (152 pages) is trans-

mitted with this report. Also the exhibits marked and numbered C. A., No. 1 to 70, inclusive, and O. A., No. 1 to 10, inclusive.

JAS. G. PAYNE,
Spec. Auditor.

Special auditor's fees, $200; stenographer's bills, $36.50.

31 [Office register of wills.—Filed July 20, 1875.—District of Columbia.]

In the supreme court of the District of Columbia, special term, probate jurisdiction.

IN THE MATTER OF THE ESTATE OF HORATIO AMES, DECEASED, and the account of Charlotte L. Ames, administratrix w. a. of said deceased, filed in this court.

And now comes Charlotte L. Ames, administratrix w. a. of the estate of Horatio Ames, by her solicitors, Ross and Edwards, and objects to the consideration of the report of James G. Payne as special auditor, filed herein on the 6th day of July, A. D. 1875, for the following among other reasons:

First. Because said report was made and filed without any authority of law.

Second. Because the orders passed in this cause by the justice holding a special term and exercising the powers and jurisdiction of the late orphans' court for the District of Columbia on the 5th day of August, A. D. 1873, and on the 17th day of March, A. D. 1874, were, and each of them was, without any authority of law, and void for want of jurisdiction.

And for the causes aforesaid moves that said report and the said orders be vacated and set aside.

JOHN W. ROSS,
JAS. S. EDWARDS,
Solicitors.

[Office register of wills.—Filed July 27, 1875.—District of Columbia.]

In the supreme court of the District of Columbia, special term, probate jurisdiction.

IN THE MATTER OF THE ESTATE OF HORATIO AMES, AND THE account of Charlotte L. Ames, administratrix w. a. of said deceased, filed in this court.

On the report of James G. Payne, special auditor.

And now comes Charlotte L. Ames, administratrix w. a. as aforesaid, by her solicitors, Ross and Edwards, and without prejudice to her motion filed herein, on the 20th day of July last past, *on* to her objection to the
32 jurisdiction of the court therein raised, except to the report of the special auditor filed herein on the 6th day of said month of July—

First. Because said auditor erred in disallowing the debts or claims, or

any portion thereof, paid by her as administratrix w. a. aforesaid, and mentioned in her said account, the same having been duly proved before payment.

Second. Because her right to a credit for the said debts or claims so paid cannot now be controverted.

And for other good and sufficient reasons appearing in said report.

JOHN W. ROSS,
JAS. S. EDWARDS,
Solicitors.

In the supreme court of the District of Columbia, holding a term for probate business, August 9, 1875.

IN RE ESTATE OF HORATIO AMES. } Filed August 9, 1875.

The petitioner, Oliver Ames, excepts to the following findings of the special auditor in this case:

1st. To the allowance of ten per cent. on $25,000 in favor of Clifford Arrick as a valid claim against the estate.

2d. To the similar allowance of 10 per cent. on $29,955 in favor of said Arrick.

STANTON & WORTHINGTON,
Solicitors for Petitioner.

Decree in special term.

In the supreme court of the District of Columbia, holding a special term, probate jurisdiction.

IN RE ESTATE OF HORATIO AMES, DECEASED. }

This cause coming on to be heard upon the papers relating to the estate of Horatio Ames, deceased, filed in this court, and upon the first account of said administratrix, and the vouchers numbered 1, 2, 3, 4, and 5, filed therewith, and the exceptions to said account filed on behalf of Oliver Ames, and upon the report of the special auditor, James G. Payne, esq., filed on the 6th day of July, 1875, and the depositions of Clifford Arrick and others, filed therewith, and the exceptions to said report filed on behalf of said administratrix, and on behalf of said Oliver Ames, and the de-
33 positions and exhibits thereto, notwithstanding objection of counsel for said Charlotte L. Ames to the deposition of Oliver Ames as incompetent, having been read to the court, and the matter having been argued by counsel, for said administratrix by James S. Edwards, and by Messrs. Stanton and Worthington, counsel for said Oliver Ames, after consideration thereof, it is, this 22d day of January, 1876, ordered, adjudged, and decreed that the report of said special auditor be, and it is hereby, ratified and confirmed, except in so far as it allows said administratrix credit for $2,500, as being due Clifford Arrick for professional services in the collection of $25,000 from the United States, on the 11th day of April, 1871, and in that respect said report be, and hereby is, overruled.

And except also inasmuch as it allows said administratrix a commission of 6½ per cent. on $39,955, and that in that respect said report be, and it hereby is, overruled, and said administratrix is hereby allowed a commission of five per cent. on said sum of $39,955 for her commissions as administratrix in this case.

It is further ordered, adjudged, and decreed that the exceptions to the report of the said special auditor filed on behalf of said Oliver Ames, so far as they relate to an allowance of 10 per cent. on $39,955, to said administratrix, be, and they are hereby, overruled, and in other respects they are sustained; and that the exceptions to the said report of the special auditor, filed on behalf of said administratrix, be, and they are hereby, overruled. Said administratrix is hereby charged with the sum of $39,955, the amount received by her as stated in her said account, and she is credited with $125, due James O. Clephane, with $2,955.50 due Clifford Arrick, and $1,997.75, hereby allowed her as her commission as administratrix; and she is hereby directed to pay over to Nathaniel Wilson, administrator c. t. a. t. b. n., of the estate of Horatio Ames, deceased, on or before the 8th day of February, 1876, the sum of $34,876.75.

By the court:

A. B. OLIN, *Justice.*

34 [Office register of wills.—Filed January 25, 1876. District of Columbia.]

In the supreme court of the District of Columbia, special term, probate jurisdiction.

IN THE MATTER OF
THE ESTATE OF HORATIO AMES, DECEASED.

And now comes Charlotte L. Ames, administratrix c. t. a. of the said Horatio Ames, deceased, and appeals from the decree of the justice holding a special term, probate jurisdiction, passed herein on the 22d day of January, A. D. 1876, to the general term of this court.

CHARLOTTE L. AMES,
By JAS. S. EDWARDS, *Her Solicitor.*

Decree in general term.

In the supreme court of the District of Columbia, in general term.

IN THE MATTER OF
THE ESTATE OF HORATIO AMES, DECEASED.

This cause coming on to be heard at this term upon an appeal taken by Charlotte L. Ames, administratrix, from the order and decree made on the day of , 187 , by the justice holding a special term of this court for probate business, and having been argued by counsel for said administratrix, and by counsel for Oliver Ames, and for Nathaniel Wilson, administrator d. b. n. c. t. a., upon consideration thereof, it is this 28th day of March, 1877, ordered, adjudged, and decreed that said order and decree of the special term be, and it is hereby, in all things affirmed.

By the court:

A. W.

EXHIBIT C.

In the supreme court of the District of Columbia, holding a special term.—January 10, 1875.

IN THE MATTER OF
THE ESTATE OF HORATIO AMES.

It appearing that on July 7, 1874, a petition was filed by Mr. H. Barnum for an order requiring Charlotte L. Ames, administratrix with the will annexed upon the estate of Horatio Ames, deceased, to file an additional bond as such administratrix; and that on July 29, 1874, an answer thereto was filed in behalf of said administratrix; and that
35 the said matter was thereafter argued upon said petition and answer in behalf respectively of said petitioner and said respondent; and that on September 22, 1874, this court passed an order "that one additional surety be furnished who can justify in the sum of $40,000;" and that on December 10, 1874, motion was filed in behalf of said petitioner for removal of said administratrix with the will annexed from her said office, on account of neglect to file additional bond, as ordered by the court; and it further appearing that said motion has from time to time been called up, and that said Charlotte L. Ames has not yet complied with said order of court of September 22, 1874, it is thereupon, this 9th day of January, 1875, ordered that said Charlotte L. Ames be, and hereby is, removed from office as administratrix with will annexed of said estate; and that Nathaniel Wilson be, and is hereby, appointed as administrator, with will annexed, of said estate, and that he file his bond in the penal sum of one hundred and sixty thousand dollars, conditioned for the faithful performance of his duties as such administrator, with sufficient surety or sureties upon said bond, the same to be approved by the court. And it is further ordered that said Charlotte L. Ames be, and hereby is, directed to forthwith pay and transfer to said Nathaniel Wilson all moneys and assets belonging to said estate and held by her as such administratrix with the will annexed under appointment from this court, or by her agents or attorneys.

By the court:

A. B. OLIN.

True copy. Test:
[SEAL.]

A. WEBSTER,
Register of Wills.

EXHIBIT D.

The United States Navy Department to Charlotte L. Ames and Oliver Ames, administratrix and administrator of the estate of Horatio Ames, Dr.

For payment for guns contracted for February 3, 1865, according to the agreement of April 8, 1871 (under act approved July 14, 1870).....	$25,000
	$25,000

36 Approved in duplicate for twenty-five thousand dollars and cents, payable by Paymaster J. O. Bradford, at New York, from the appropriation for "payment of contracts," &c.

GEO. M. ROBESON,
Secretary of the Navy.

NAVY DEPARTMENT, *April* 11, 1871.

Received, New York, May 9, 1871, of Paymaster J. O. Bradford, United States Navy, twenty-five thousand dollars and cents, in full for the above.

OLIVER AMES & CHARLOTTE L. AMES,
CHARLOTTE L. AMES & OLIVER AMES,
Administratrix and Administrator of estate of Horatio Ames, Dec'd.

(Endorsed:) 1413. (Stamped:) Fourth Auditor's Office, October 31, 1871.

Pay to the order of Clifford Arrick, April 29, 1871: Charlotte L. Ames & Oliver Ames, administratrix and administrator of the estate of Horatio Ames, deceased.

Pay to the order of Clifford Arrick, May 5, 1871: Oliver Ames & Charlotte L. Ames, administratrix and administrator of the estate of Horatio Ames, deceased.

Pay to the order of Jay Cooke & Co., Washington, D. C., May 8, 1871: Clifford Arrick.

(Stamped:) Pay to the order Jay Cooke & Co., New York. (Written:) Jay Cooke & Co., P. H. C. Swain, Jay Cooke & Co.

The United States Navy Department to Charlotte L. Ames, administratrix of Horatio Ames, deceased, Dr.

In full for payment of final balance for guns contracted with the Department before March 4, 1869	$29; 955
	$29, 955

Approved in duplicate for twenty-nine thousand nine hundred and fifty-five dollars and cents, payable by Pay Director J. O. Bradford, at New York, from the appropriation for payment on contracts, &c.

GEO. M. ROBESON,
Secretary of the Navy.

NAVY DEPARTMENT, *January* 7, 1873.

37 Received, N. Y., Jan'y 15, 1873, of Paymaster J. O. Bradford twenty-nine thousand nine hundred fifty-five dollars and cents, in full for the above.

CHARLOTTE L. AMES,
Administratrix, &c.

(Endorsed:) 461. (Stamped:) Fourth Auditor's Office, July 31, 1873.

Pay to Clifford Arrick or order. January 8, 1873: Charlotte L. Ames, administratrix. Jan'y 15, 1873: Clifford Arrick.

38 PROCEEDINGS BEFORE THE SUPREME COURT OF THE DISTRICT OF COLUMBIA IN GENERAL TERM, COMMENCING ON MONDAY, THE 19TH DAY OF APRIL, 1880; PRESENT, CHIEF JUSTICE CARTTER AND JUSTICES WYLIE AND COX.

TUESDAY, *April* 27, 1880.

Session resumed pursuant to adjournment. Present, Justices Wylie, Hagner, and Cox.

NATHANIEL WILSON, ADMINISTRATOR WITH THE will annexed of Horatio Ames, deceased,
vs.
CLIFFORD ARRICK (REVIVED IN NAME OF Josephine C. Arrick, administrator). } At law. No. 14380.

Argued by Mr. Worthington for plaintiff, and by Mr. Davidge for defendant, his argument to be resumed to-morrow.

39 WEDNESDAY, *April* 28, 1880.

Session resumed pursuant to adjournment. Present, Justices Wylie, Hagner, and Cox.

NATHANIEL WILSON, ADMINISTRATOR WITH THE will annexed of Horatio Ames, deceased,
vs.
CLIFFORD ARRICK (REVIVED IN NAME OF Josephine Arrick, administrator). } At law. No. 14380.

Argument resumed by Mr. Davidge for defendant, and Mr. Wilson for plaintiff, in conclusion, and submitted to court.

MONDAY, *May* 3, 1880.

Session resumed pursuant to adjournment. Present, Justices Wylie, Hagner, and Cox.

40 NATHANIEL WILSON, ADMINISTRATOR with the will annexed of Horatio Ames, deceased,
vs.
CLIFFORD ARRICK (REVIVED IN NAME OF Josephine C. Arrick, administrator. } At law. No. 14380.

And now again come the parties, by their respective attorneys; whereupon, because it appears to the court here that there is no error in the record and proceedings in the judgment of the special term, therefore it is considered that the judgment of the special term be, and the same is hereby, affirmed with costs, the plaintiff's motion for a new trial notwithstanding.

41 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court before you, between Nathaniel Wilson, administrator with the will annexed of Horatio Ames, deceased, against Clifford Arrick, No. 14380, a manifest error hath happened, to the great damage of the said Nathaniel Wilson, adm'r, &c., as by his complaint appears; and it being fit that the error, if any hath hap-

pened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 3d day of September, in the year of our Lord 1880, and of the Independence of the United States the 105.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To Josephine Arrick, adm'r'x of Clifford Arrick, dec'd:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Nathaniel Wilson, administrator with the will annexed of Horatio Ames, deceased, is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

42 In the supreme court of the District of Columbia, the day of July, 1880.

NATHANIEL WILSON, ADMINISTRATOR DE BONIS non of Horatio Ames, deceased, *vs.* JOSEPHINE C. ARRICK, ADMINISTRATRIX OF Clifford Arrick, deceased.	At law. No. 14380. In error.

Know all men by these presents that we, Nathaniel Wilson, administrator de bonis non of the estate of Horatio Ames, deceased, and are bound unto the above-named Josephine C. Arrick, administratrix of the estate of Clifford Arrick, deceased, in the sum of five hundred dollars, to be paid to the said Josephine C. Arrick, administratrix as aforesaid, her executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this day of July, 1880.

Whereas the above-named Nathaniel Wilson, as administrator de bonis non as aforesaid, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Nathaniel Wilson, administrator de bonis non as aforesaid, shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

NATHANIEL WILSON. [SEAL.]
Administrator de bonis non of the estate of Horatio Ames, deceased.
HENRY BEARD. [SEAL.]

Sealed and delivered in presence of—
D. K. CHAMBERS.

Approved.

A. B. HAGNER,
Asso. Justice.

SEPT. 3, '80.

Attestation of record.—Clerk's certificate.

Clerk's office, supreme court of the District of Columbia.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 2d day of October, 1880.

R. J. MEIGS, *Clerk.*
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 2d day of October, 1880.

D. K. CARTTER. [SEAL.]
Chief Justice.

Clerk's certificate to justice's official character.

I, Return J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 2d day of October, 1880.

R. J. MEIGS, *Clerk.*
By R. J. MEIGS, JR.,
Assistant Clerk.

(Indorsement on cover:) No. 88. Nathaniel Wilson, administrator of Horatio Ames, deceased, plaintiff in error, vs. Mrs. Josephine C. Arrick, adm'x of Clifford Arrick, dec'd. Dist. of Col., supreme court. Filed 11th October, 1880.

112-83

IN THE

Supreme Court of the United States.

OCTOBER TERM 1884.

No. 4.

NATHANIEL WILSON, Administrator de bonis non of HORATIO AMES, deceased, Plaintiff in Error,

vs.

JOSEPHINE C. ARRICK, Administratrix of CLIFFORD ARRICK, deceased.

BRIEF FOR PLAINTIFF IN ERROR.

A. S. WORTHINGTON,
Attorney for Plaintiff in Error.

THOMAS MORRILL & CO., PRINTERS, WASHINGTON.

In the Supreme Court of the United States.

October Term 1884.

NATHANIEL WILSON, administrator *de bonis non* of HORATIO AMES, deceased, plaintiff in error,
vs.
JOSEPHINE C. ARRICK, administratrix of CLIFFORD ARRICK, deceased.

No. 4.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

In April, 1873, Charlotte L. Ames was acting as administratrix of the estate of her deceased husband, Horatio Ames, under appointment of the Supreme Court of the District of Columbia. In May of that year she filed her account as administratrix, in which she charged herself with the sum of $10,000, collected from the United States in April, 1871, and with the sum of $29,955, as collected in January, 1873, also from the United States. (Record, 9.) She claimed as credits three payments made to Clifford Arrick, amounting to $33,574.36, and filed vouchers signed by him for these sums, in which he stated that the several payments were made by him "as per agreement with the deceased." (Record, 11, 12.) To this account exceptions were filed on behalf of Oliver Ames, a brother of Horatio. (Record, 14.) It is unnecessary here to go into the details of the controversy between Oliver Ames and the estate of Horatio. It is sufficient to say that the claim against the United States, on account of which the above sums of

$10,000 and $20,995, respectively, were paid, it was maintained, by Oliver Ames, belonged to him, and that it was so ultimately decided by the courts of Connecticut where the issue was tried. (Record, 18, 19.) After filing her account, and before the case was heard on the exceptions to the account, Mrs. Ames was removed by the court that appointed her, for having failed to comply with an order requiring her to give additional bond. (Record, 28.)

The plaintiff in error, Nathaniel Wilson, was appointed administrator *de bonis non* in her place. This occurred January 9th, 1875. (Record, 28.)

Subsequently, the exceptions were heard, and the credit of $33,574.36, which the administratrix claimed on account of payments to Arrick, was reduced by the court to $2,955.56. (Record, 27.) At the same time the commissions she claimed were also reduced. The account as filed by her showed a balance of $2,260.64. (Record, 9.) As corrected by the court, this balance was increased to $34,876.75. (Record, 27.)

When Mrs. Ames was removed, and the plaintiff in error appointed administrator *de bonis non*, she was directed to transfer to him "all moneys and assets belonging to said estate and held by her as such administratrix, or by her agents or attorneys. (Record, 28.) When the account was finally stated by the court, January 22d, 1876, she was directed by the same decree to pay over to the administrator *de bonis non* the sum of $34,876.75, with which she was then charged. (Record, 27.)

Upon this last decree the new administrator brought suit against Mrs. Ames and her sureties. In that action it was determined on demurrer by this court that so much of the decree of January 22d, 1876, as required the removed administratrix to pay over the fund to her successor was void, because it was conceded in the pleadings that it was a fund which she had collected from the United States, and which she had therefore "administered."

United States *v.* Walker, 109 U S., 260.

July 2d, 1875, this suit was brought by the administrator *de bonis non* against Arrick himself. It will be observed that this was after the removal of Mrs. Ames, and before her account had been stated by the court. In various forms the declaration states an indebtedness of Arrick to the plaintiff, growing out of the receipt by him of the $39,995 with which Mrs. Ames had charged herself in her account as administratrix. One count is for money received by the defendant for the use of the plaintiff. (Record, 1.)

The defendant pleaded the general issue, that the money claimed in the declaration had been paid to him by the administratrix in good faith for services rendered Horatio Ames in the latter's life-time, and that the plaintiff had no right to sue, because the fund sued for had been administered by the former administratrix. (Record 2, 3.) The plaintiff joined issue on these pleas. (Record 3.)

Before trial Arrick died, and the cause was revived against the defendant in error, his wife, as his administratrix.

At the trial the record of the proceedings in the Probate Court in the matter of the account of Mrs. Ames was put in evidence by the plaintiff. (Record, 9–28.) Evidence was offered also tending to prove that "the charges made by the said Clifford Arrick in said vouchers were fraudulent and excessive, and that the said Arrick had no agreement with the said Horatio Ames entitling the said Arrick to the said sums of money or to any part thereof." It was shown, further, that Arrick, as attorney for Mrs. Ames, the administratrix, received from the United States the fund in question, and that from that time on he kept control of it. (Record, 7, 8.) Arrick, it was proved by the defendant, received the fund from the United States upon receipts signed by Mrs. Ames as administratrix. (Record, 29.)

Thereupon the court charged the jury, in substance, that the fund in question was administered by Mrs. Ames when she collected it from the United States, and that being so,

that the plaintiff could not recover. A verdict for the defendant was rendered accordingly, and judgment thereon entered. The plaintiff took the case on bill of exceptions to the court in General Term, where the judgment below was affirmed; (Record, 30;) and the plaintiff sued out a writ of error to this court. Record, (30.)

The opinion of the court in General Term is annexed to the brief of the plaintiff in error in The United States *v.* Walker, and is reported in VII *Washington Law Reporter*, 291. It covers the same ground as the opinion of this court in the case against Walker, and does not discuss the points or authorities herein below mentioned.

At the trial the deposition of Oliver Ames was excluded, on the ground that he was a party in interest.

Assignment of Errors.

I.

1. The court below erred in holding that the fact that the former administratrix had, through her attorney, Arrick, collected the fund in question from the United States, precluded her successor from recovering that fund from Arrick or his estate.

2. The court below erred in holding that the fact that, after Arrick had collected the fund, as attorney of the former administratrix, she paid him a part of it on account of supposed services and expenses rendered and incurred by him under a supposed agreement with her intestate, precluded the plaintiff from showing that such payments were obtained by fraud, and from recovering in this action the sums so paid.

II.

The court erred in excluding the deposition of Oliver Ames.

ARGUMENT.

I.

In the case of The United States, use of Wilson, administrator, &c., *v.* Walker, (109 U. S., 260,) it was contended on behalf of the plaintiff in error that an administrator *de bonis non* appointed in place of an administrator who had been removed under section 975 of the Revised Statutes of the District of Columbia, was entitled to recover from his predecessor a fund which that predecessor as such had collected from a debtor of the intestate. But this court held that the common-law doctrine (substantially incorporated in the laws of Maryland in force in this District) limiting the rights of an administrator *de bonis non* to property remaining in specie, applies to proceeding under the act in question. It is not proposed now to ask the court to reconsider that decision.

But it is insisted that this action should be maintained on common-law principles, and without controverting the opinion of this court in Walker's case. That opinion proceeds upon the ground that "when a debt due the deceased is collected, or a chattel of his estate is sold, the money received becomes the property of the administrator." It is contended now that while that is the case as against the first administrator or his representatives, it is not the law when it is sought to recover the money so collected from a third person to whom as agent it was paid. It is claimed that in this last case the following rules apply:

1. If the action be brought by the first administrator while his authority as administrator continues he may treat the fund in the hands of such third person either as a debt due him individually or as one due the estate which he represents, and so sue, either in his own name or as administrator, as he may elect.

2. If the first administrator die (or be removed) before the agent who has collected the fund has paid it over, the administrator *de bonis non* may also treat the fund as property belonging to the estate, and sue for and recover it accordingly.

As to the first of the above propositions, the cases are collected in 2 Williams on Executors, 7th ed., 952, note "g." It was formerly contended that contracts made with an administrator were personal to him, and that he must sue on them in his own right; but the contrary doctrine is now firmly established. A leading case on this point is Clarke *v.* Hougham, 2 B. & C., 149. In that case an administratrix had been induced by misrepresentation to pay money which was not due, and she had sued as administratrix to recover the sum so obtained from her by fraud. It was contended for the defendant that the suit should have been brought by the plaintiff in her individual capacity; but the judges of the King's Bench all thought the suit was well brought.

Bayley, J., said:

"It has been assumed that where the payment is a *devastavit* the personal representative can sue only in his own name. That is a principle to which I cannot assent. On the contrary, when he discovers that he has in his representative character paid that which he ought not, he may in the same character recover it again. The money was assets; and if the suit be as executor or administrator, it will continue assets."

Holroyd, J., said:

"The administratrix might be liable for a *devastavit*, but that would not prevent her from suing as administratrix. Indeed, she was bound so to sue, in order to protect the assets from a set-off for her individual debts."

And Best, J., in conclusion, adds:

"Then the only question is whether the plaintiff can recover the last payment as administratrix. Ord *v.* Fenwick (*a*) and Watson *v.* Spencer (*b*) show that where the money is assets the action may be brought in the representative character. No doubt this money will be assets; and the safest and best mode is to proceed for it in the right of the intestate."

(*a*) 4 T. R., 561.

(*b*) 3 B. & A., 360.

The same rule has always prevailed in Maryland.

Sasser *v.* Walker's Ex'r, 5 G. & J., 102.

Chapman *v.* Davis, 4 Gill., 166.

The second of the above propositions seems to follow logically from the first. There is an intermediate question which may be looked at a moment as leading the way. Suppose that an administrator, who, as such, has sued upon a contract made with him in his representative capacity, dies pending the suit; who takes his place? Since at common law the action would abate, we must look to the statutes in force here for an answer to this question. These are the Maryland Acts of 1785, chap. 80, sec. 1, and 1798, chap. 101., sub.-chap. 14, section 4. (2 Kilty's Laws.)

The act of 1785 provides that no action shall abate by the death of either of the parties, but that on the death of a defendant "the heir, devisee, executor, or administrator of the defendant, as the case may require, *or other person interested on the part of the defendant*, may appear to such action; and that on the death of a plaintiff in any action the appearance of the heir, devisee, executor, or administrator, as the case may require, *or other proper person to prosecute such suits*, shall be admitted, to be entered to the same.

The act of 1798, chap. 101, simply provides that executors and administrators shall conform to the directions of the act of 1785, chap. 80.

In the case of Gist's Administrator *v.* Cookey, 7 H. & J., 134, an action was brought against an executor who died pending the suit. His successor, the administrator *de bonis non*, having been substituted in his place, it was objected that the foregoing acts do not provide for such a case, and that consequently the suit abated when the executor died. But the Court of Appeals of Maryland held otherwise, and said it was difficult to imagine for what other purpose the words "or other person interested on the part of the defendant" could have been introduced, and that by their decision they followed the uniform construction given to the act of 1785 from the time it was passed till the argument in the case before them. This decision was rendered in 1826.

And that the same construction must be given to the words of the second clause of the act of 1785—"or other proper person to prosecute such suits"— can hardly be questioned. (See, on the question of construction of such an act, Crane *v.* Alling, 14 N. J. L., 593.)

If, then, an administrator, upon a contract made with as such, may sue in his own right or in his representative capacity, and if, when he sues as administrator and dies, the suit must be continued by the administrator *de bonis non*, on what principle can it be contended that if he die before bringing the suit at all it may not be brought by the administrator *de bonis non?*

The argument which proved fatal to the plaintiff in Walker's case—that when property is sold or a debt collected by an administrator the proceeds of such sale or collection are his property, and not assets—cannot avail here. All the cases in which that doctrine is laid down, it is believed, are suits against the administrator (or executor) or his representative; and it has been shown (and will not be denied) that when the proceeds of such sale or collection are in the hands of a third person the administrator may treat them as assets or not—that indeed it is his duty to

treat them as assets. And if he do his duty, and sue accordingly, and die, or be removed pending the suit, no one but the administrator *de bonis non* can take his place; so that "administered" assets do go to the administrator *de bonis non* when the administrator elects to treat them as belonging to the intestate and not to himself. It is submitted, too, though there are no adjudications to this point, that if a removed administrator, or the representative of a deceased one, who holds assets that have been only technically administered, chooses to deliver them to the administrator *de bonis non*, he may do so, and is thereby discharged from liability concerning them. If an administrator may, as such, sue a bank for money deposited in it by him as administrator, it is difficult to see why, being removed, he cannot give the bank a valid order to pay the fund to his successor.

And so, finally, it would seem to follow that, since an administrator may elect to treat a fund collected by his agent after the death of the intestate, and remaining in that agent's hands, as assets of the estate, his successor may do the same. And so are the authorities. The question has been adjudicated twice—once in England, in 1823, in the Court of King's Bench, and again in the District of Columbia, in 1833, by the Circuit Court of that District. In each case the action by the second administrator was sustained.

The English case is Catherwood *v.* Chabaud, 1 B. & C., 150. There a bill of exchange was indorsed generally, but delivered to S. C. as administratrix for a debt due the intestate. After the bill matured S. C. died, and the administrators *de bonis non* brought suit on the bill. It was contended that the suit should have been instituted by the administrator of S. C. Each of the judges gave a separate opinion, all agreeing that the action should be sustained; and it was laid down broadly that wherever the first admin-

istrator may sue in his representative character, the right of action devolves upon the administrator *de bonis non*.

The other case is Blydenburgh *v.* Lowry, 4 Cranch C. Ct., 368. The money sued for in that case was the proceeds of the foreclosure of a mortgage. These proceeds were paid to the agent of the first administrator, and the second administrator was allowed to recover them in a suit against that agent. The first administrator was appointed in Pennsylvania; the second (after the death of the first) in New York. [At that time, by the act of Congress of June 24th, 1812, sec. 11, (2 Stats. at Large, 758,) an administrator appointed anywhere in the United States could sue in the District without taking out letters auxilllary.]

With these cases may be considered that of Cole *v.* Hebb, 7 G. & J., 20. An executor who had brought suit, as executor, against Cole to recover certain slaves which he, the plaintiff, contended belonged to the testator's estate, had been removed during the suit, and the action had been revived in the name of the administrator *de bonis non*. It was contended by the defendant that Hebb was not the proper party to continue the prosecution of the suit. The trial court ruled otherwise, and on appeal this ruling was sustained. The appellate court said:

"The negroes never having been in the executor's possession, and being, when recovered, with damages awarded for their unjust caption and detention, assets of the testator in the hands of the executor, the suit was properly brought by George Guyther in his representative character. The revocation of his letters divested him of all power further to conduct the suit; and the right to its further prosecution vested in the administrator *de bonis non*, according to the provisions of our Acts of Assembly, [1785, chap. 80 and 1798, chap. 101, sub-chap. 14, sec. 4, *supra*,] wisely enacted to prevent the abatement of suits."

Some weight seems, indeed, to be given here to the fact that the executor had never been in possession of the

slaves, but it is obvious that that is immaterial; for it is the conversion and not the possession of personal property that is said to constitute an administration of it. But it is to be observed that the administrator *de bonis non* was allowed to recover damages for detention during the time of the executor, because such damages, if the executor had recovered them, would have been assets. Now, we have already seen that in Maryland as in England the administrator (or executor) may, and should, sue as such upon any contract (express or implied) made with him in his representative character, for the very reason that the proceeds of such an action will be assets.

But it will be maintained on behalf of the defendant in error that, even if this suit was properly brought for money received by Arrick as agent of the administratrix, and held by him for her, the action must fail, because the plaintiff's evidence shows that Mrs. Ames had authorized Arrick to retain it on account of certain alleged services and expenses. To this objection there are two answers:

1. There was evidence tending, at least, to prove that Arrick by fraud induced Mrs. Ames to file an account, claiming credit for large sums purporting to have been paid to him by her. In each of his receipted bills the amount thereof is stated to be due him as per agreement with (or of) the deceased; (Record, 11, 12;) whereas there was no such agreement. (Record, 7.) The charges made in these vouchers were shown to be fraudulent and excessive, and the whole of the papers was in Arrick's handwriting. (Record, 7.) He received the fund in the first instance as an attorney; his client was a woman; and he, not she, controlled the fund after he had collected it. Shortly before his death he had boasted of this control, and stated that he intended to keep control till the end of the litigation over it. (Record, 8.) This was the evidence on the plaintiff's behalf, and it is to be taken to be true for

the purpose of this discussion. It is manifest that Mrs. Ames, after the disallowance of these credits, if she had not been removed meanwhile, could, as administratrix, have successfully sued Arrick for this fund. If Arrick, as he boasted, kept control of it, she never paid it to him; and even if she did pay it, believing his representations as to his agreement with her husband, she could, upon discovering the fraud, recover it in an action for money had and received.

4 Wait's Actions and Defences, 495, 496.
Catts *v.* Phalen, 2 How., 376.

2. But this objection goes only to a part of the fund. In filing her account, Mrs. Ames admits a balance against her of $2,260.64. (Record, 9.) In this account she claimed for her commissions $3,995. The court reduced her commissions to $1,997.75. This, added to the balance admitted, makes a total of $4,257.89 in Arrick's hands—under his control from the time the Government paid it to him—as to which there is no pretense either that he had any right to retain it or that Mrs. Ames ever assumed to give it to him. As to this sum, Mrs. Ames, as administratrix, certainly could have sued Arrick; the money, when recovered, would have been assets; and the right of action devolved upon the administrator *de bonis non.*

II.

The other error assigned is the ruling of the court excluding the deposition of Oliver Ames as to transactions between him and Arrick. This ruling was based upon section 858 of the Revised Statutes of the United States, which provides, among other things, that in actions against administrators *neither party* shall be allowed to testify as to any transaction with or statement by ~~this~~ the intestate, unless called by the opposite party or required to testify by the court.

Here Oliver Ames was not a party. He was interested in the result, no doubt; but the statute does not cover such a case. Whether because the reason for excluding the testimony of one who is interested in the result is the same as that for excluding the parties themselves, the courts shall strain the words of the law to cover all such cases, is a question that frequently arises, but no reported decision of it has been found.

It is submitted, that to make the words "either party" include all who may have an interest in the litigation, would be carrying construction to the point of legislation.

A. S. WORTHINGTON,
Attorney for Plaintiff in Error.

112-83

IN THE

Supreme Court of the United States.

October Term, 1884.

No. 4.

In Error to the Supreme Court of the District of Columbia.

NATHANIEL WILSON,

Administrator, &c., of Horatio Ames, deceased,

Plaintiff in Error,

vs.

JOSEPHINE C. ARRICK,

Administratrix, of Clifford Arrick, deceased,

Defendant in Error.

Brief in behalf of the Defendant in Error.

HENRY E. DAVIS,

For the Defendant in Error.

WASHINGTON, D. C.:
R. O. POLKINHORN & SON, PRINTERS,
1884.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

NATHANIEL WILSON, Admr., &c., of HORATIO AMES, deceased,
Plaintiff in Error,

vs.

JOSEPHINE C. ARRICK, Admix., of CLIFFORD ARRICK, deceased,
Defendant in Error.

No. 4. In error to the Supreme Court of the District of Columbia.

Brief in behalf of the Defendant in Error.

STATEMENT OF THE CASE.

Prior to January, 1871, Horatio Ames, then in his life-time, held a claim against the United States, on account of furnishing to the said United States certain cannon. Some of the cannon were furnished during the life-time of Ames, and others were furnished by his representatives after his death. (R., pp. 10, 17, 18.)

Ames died in January, 1871. (pp. 7, 18.) Before his death he was paid for the cannon furnished by him (p. 10); and immediately after his death certain proceedings were had with respect to administration on his estate, (pp. 7, 18,)

not necessary to be further noticed. Eventually, his widow, Charlotte L. Ames, was appointed by the Supreme Court of the District of Columbia, duly qualified, and until the 9th day of January, 1875, remained, administratrix with the will annexed of the said Horatio Ames. (pp. 1, 7, 13, 28.)

Oliver Ames, brother of Horatio, asserted ownership of the claim against the United States; but as the title thereto was in Horatio and the dealings of the United States were with him or others, as his representatives, Oliver's claim plays no part in this cause. (pp. 7, 10.)

After Horatio's death, and while his widow continued his administratrix as aforesaid, the United States paid on account of the claim several sums, aggregating $113,955, of which amount $54,955 were collected by Clifford Arrick, (intestate of the defendant in error,) as attorney (pp. 7, 8, 10); but the whole amount, $54,955, was duly receipted for by Oliver and Charlotte L. Ames, as administrator and administratrix of Horatio. (pp. 8, 29.) Of this amount $15,000 were accounted for to Oliver Ames, and the remainder, $39,955, was retained by Arrick (pp. 8–9), who claimed almost all of it for services rendered by him in prosecuting and collecting the claim. (pp. 10–13.)

In accounting as administratrix, Mrs. Ames charged herself with the whole amounts received by Arrick, and claimed allowances for $33,574.36, as paid Arrick for his services. (pp. 9–13.)

On January 9, 1875, Charlotte L. Ames was removed from her office of administratrix, &c., of Horatio Ames, and the plaintiff in error was appointed administrator *d. b. n. c. t. a.* in her stead. In the order so removing her and appointing the plaintiff in error, the court further directed the deposed administratrix forthwith to "pay and transfer to said Nathaniel Wilson all moneys and assets belonging to said estate and held by her as such administratrix, with the

will annexed, under appointment from this court, or by her agents or attorneys." (p. 28.)

This action was instituted on the 2d day of July, 1875, its object being to recover from Arrick the sum of $39,955 received by him, as above set forth. Arrick pleaded, besides the general issue, the statute of limitations, receipt of the money as compensation for his services, and plaintiff's incapacity to sue for the money, because it had been administered by Charlotte L. Ames. The verdict and judgment went for the defendant, and plaintiff seeks a reversal on a writ of error.

Assignment of Errors.

The record discloses two rulings of the court below, complained of as errors:

1. The court's refusal to admit testimony tending to show that Arrick's charges for services rendered were "unconscionable" (p. 8); and

2. The court's charge to the jury that by virtue of the receipts given by her, Mrs. Ames, the administratrix, was invested with the control of the moneys mentioned in those receipts; and that her parting with control of the moneys, or her wasting them in any way, constituted an "administration of the assets," precluding any right of the plaintiff to sue for them. (pp. 8–9.)

Argument.

I.

The real question is raised by the second exception: What is the right of an administrator *d. b. n.* to assets in the hands of the administrator or executor whom he has displaced?

1. The title of an administrator *d. b. n.* extends only to the goods and personal estate which remain *in specie*, and were not administered by the first executor or administrator; as also to all debts due and owing to the testator or intestate.

U. S. vs. *Walker*, 109 U. S., p. 260,
Citing *Bacon's Abridgment*, etc.
Alsop vs. *Mather*, 8 Conn., 584.
Am. Board's Appeal, 27 Conn., 344.

This principle belongs to the English law, (*Beall* vs. *New Mexico*, 16 Wall., 535), and to the law of Maryland, before the organization of the District of Columbia, (*Ennis* vs. *Smith*, 14 How., p. 416); and it continues as law in the District of Columbia. Nor is the principle in any wise different in the case of an administrator *d. b. n.* appointed in the stead of a removed administrator.

U. S. vs. *Walker*, *ubi supra*, pp. 261–2.

The act of Maryland of 1798 did not mean to make any property of the testator assets in the hands of an administrator *d. b. n.* which did not exist in specie. The authority conferred by letters of administration *d. b. n.* by our law is to administer all things described in the act as assets *not converted into money*, etc.; and an administrator *d. b. n.* can sue for those goods, chattels and credits only which his letters authorize him to administer.

Sibley vs. *Williams*, 3 G. & J., 52, pp. 63–4.
Neale vs. *Hagthorp*, 3 Bl., 551; 7 G. & J., 13.
Hagthorp vs. *Hook's Admrs.*, 1 G. & J., 270.
Ennis vs. *Smith*, *ubi supra*.

The act of Congress of 20th February 1846, (R. S. D. C., Secs. 974–978), which provides for the appointment of an administrator *d. b. n.* in the place of a removed executor or administrator, does not change the rule; on the contrary,

it re-states that rule, applying it to the new case provided for.

> The court shall further have power to order and require any assets or estate of the decedent, which may remain unadministered, to be delivered to the newly appointed administrator *de bonis non*, and to enforce a compliance with such order by fine and attachment, or any other legal process. (Sec. 976.)

2. The subject-matter of this action was not in specie and unadministered at the time of the plaintiff's appointment.

That subject-matter consists in moneys paid since the death of the testator, but during his widow's incumbency of the office of administratrix. So far as concerns so much of the demand of Horatio Ames against the United States as is involved in this controversy, it retained its character as a claim until after his death. He died in January, 1871. The first payment by the United States of any of the moneys involved in this action was made in April following; the second and last payment was made January 6th, 1873. Both payments were to Arrick, in his character of attorney for the then legal representatives of Ames: in legal contemplation, the payments were made to those representatives.

The moneys so received by Arrick and sought to be recovered in this action were never assets of Ames, in the sense in which that word is used in this connection: the "assets" consisted in his claim upon the United States, as it stood at the time of his death, for what was still due on account of his contract to furnish the cannon. Had this claim not been liquidated at the time of the plaintiff's appointment as administator *de bonis non*, he, and he alone, would have been entitled to prosecute it to collection. But the fact is that what had been a claim at the date of Ames' death had, at the time of plaintiff's appointment, become adjudicated and converted into cash by his predecessor in office. This and the disposition made of the proceeds clearly

constituted "administration of the assets;" and for that disposition of the proceeds of the claim the plaintiff's predecessor and her bondsmen had become unchangeably responsible to the creditors, legatees and distributees of her husband.

Ennis vs. *Smith*, *ubi supra*;
U. S. vs. *Walker*, *ubi supra*.

In the light of the Maryland act of 1798, chapter 101, sub chapters 7 and 14, it is difficult to conceive how the meaning of "unadministered" or "not administered" can ever have been matter of doubt in this jurisdiction. Sub-chapter 7 defines "assets," which include every species of personal property (except heirlooms, &c.); and sub-chapter 14, section 2, after providing for administrators *d. b. n.*, proceeds:

> And the form of the letters shall be as hereinbefore directed, except that the words "already not administered" be added in their proper place; and the authority conferred by such letters shall be to administer all things herein described as assets, *not converted into money*, and not distributed or delivered or retained by the former executor or administrator, under the court's direction.

Clearly, then, assets converted into money are "administered," in the sense of the statute; and as a chose in action belongs to the category of assets, its conversion into money operates its administration.

See *De Valengin's adm'rs* vs. *Duffy*, 14 Pet., 282.

It follows that the plaintiff never had any authority or right to demand or receive of Mrs. Ames, nor had the Supreme Court of the District of Columbia the power to order her to deliver to him, the subject-matter of this action, viz: the sums of $10,000 and $29,955, collected from the United States.

3. Nor can the plaintiff maintain an action against Arrick in respect of those sums.

Arrick's possession of the moneys in the first instance was not in his individual capacity, but as representing the administratrix; and her signature to the receipts and subsequent accounting are conclusive of the question of her responsibility in the premises. The court to which she accounted disapproved her account in respect to the disposition of those moneys; this left her in the situation of having mal-administered them—in other words, as guilty of a *devastavit* in respect of them.

But an administrator *d. b. n.* may not maintain an action in respect of wasted assets. He may maintain an action against the debtor for a debt due the decedent or his estate; but this only in case of a debt or chose in action not reduced into possession by an executor or administrator since the decedent's death. The administrator *d. b. n.* may, in some instances at least, even recover of one not being executor or administrator, who has collected and not accounted for money due the decedent or his estate; but such is not this case. This case is of an administrator *d. b. n.* seeking to recover of one who received the money sued for from a preceding administratrix, who set out the whole proceeding in the account of her administration. A more complete case of "administration of the assets" cannot well be stated.

See *Beall* vs. *New Mexico*, *ubi supra*.

(*a.*) An executor's responsibility is correspondent to the means the law places in his power to possess himself of the property he is to hold *in autre droit*, and where he has not authority to take possession of assets he is not responsible for them.

Hinckley's Test. Law, Sec. 858;
Dorsey vs. *Smithson*, 6 H. & J., 63.

So an administrator *d. b. n.* is chargeable only with the funds which have come into his hands, or which he was entitled to receive from his predecessor.

Smithers vs. *Hooper*, 23 Md., 285–6;
Kearney vs. *Sascer*, 37 Md. 264, p. 277.

(*b.*) An administrator *d. b. n.* in this jurisdiction can sue only for such assets as are above described, (*ante* p. 4,) and is only responsible accordingly. He is not chargeable for, or an account of moneys collected by, or waste or default on the part of his predecessor.

Re Place, 1 Redf., Sur. 276;
Brownlee vs. *Lockwood*, 20 N. J., p. 256;
Smithers vs. *Hooper*, 23 Md., 263;
Alsop vs. *Mather*, *ubi supra*;
Am. Board's Appeal, *ubi supra*;
Beall vs. *New Mexico*, *ubi supra*.

(*c.*) And in any event an order of the court is necessary before suit brought.

R. S. D. C., Sec. 976;
West vs. *Chappell*, 5 Gill, 228;
Neale vs. *Haythorp*, 113 Bl., 551:
Johnson's Adm'r vs. *Farmers' Bk.*, 11 Md., 412.

No such order was made in this case. The only order was the wholly void direction to turn over *all* assets, &c. (R., p. 28.)

See *U. S.* vs. *Walker*, *ubi supra*.

II.

The first exception need not be considered. If the plaintiff cannot recover from Arrick under any circumstances, it is wholly immaterial what rulings the court may have made as to an offer to prove the unreasonableness of Arrick's set off, by way of charge for his services.

HENRY E. DAVIS,
For the Defendant In Error.

112-82

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

NATHANIEL WILSON,
Administrator, &c., of the estate of
HORATIO AMES, *deceased,*

vs.

M. JOSEPHINE C. ARRICK,
Administratrix of the estate of
CLIFFORD ARRICK, *deceased.*

No. 88.

And now, to wit: the 31st day of October, 1883, comes the defendant, by her counsel, Mills Dean, and appearing specially for that purpose only, moves the court to dismiss the writ of error because, although the final judgment of the Supreme Court of the District of Columbia was rendered on 3d day of May, 1880, no citation was served on said defendant, or on her then counsel, as appears from the record in said case, and the petition of the plaintiff in error and accompanying affidavit, filed October 25, 1883, and because said defendant had no notice of the suing out of said writ of error.

MILLS DEAN,
For Defendant in Error.

Service acknowledged. I waive the rule as to time.

A. S. WORTHINGTON,
Attoyney for Plaintiff in Error.

October 31, 1883.

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1883.

NATHANIEL WILSON, *Administrator, &c.*,
vs.
M. JOSEPHINE C. ARRICK, *Admr'x, &c.* } No. 88.

Brief in Behalf of Defendant in Error.

The question to be decided is, has the defendant had notice of this appeal.

The object of citation is to give notice of the appeal, not only that the appellant *intends* to appeal, but that he *has* appealed, and *perfected* his appeal. Thus the court has held, that, where the appeal was taken in open court and no bond filed during the term, a citation was necessary. *Bank* vs. *Omaha*, 6 Otto, 737.

It has also been held, that the presence of the attorney for appellee in court when an appeal was allowed at a term other than that of the decision appealed from, and without notice of motion or prayer for allowance, will not dispense with citation. *Castro* vs. *U. S.*, 3 Wall., 46.

It appears from Mr. Worthington's affidavit that writs of error were sued out in No. 87 and this case at same time. Mr. Davidge was counsel in both cases. In No. 87 citation was served, and doubtless Mr. Davidge notified his client that the appeal had been taken, and he acted accordingly; but in the case at bar, no service having been made, Mr. Davidge did not inform Mrs. Arrick that the appeal had been taken.

The fact that Mr. Davidge expressed himself as satisfied that the bond was sufficient, is no proof that he had notice that the bond had been approved and filed. In No. 87, after the bond was filed, the citation was served, and no service being had in this case, he had a right to presume the appeal was abandoned.

MILLS DEAN,
For Defendant in Error.

112-83

OFFICE SUPREME COURT U.S.
FILED
OCT 29 1883
JAMES H. MCKENNEY, Clerk.

In the Supreme Court of the United States.
October Term, 1883.

NATHANIEL WILSON, administrator, &c., of the estate of HORATIO AMES, deceased,
v.
JOSEPHINE C. ARRICK, administratrix of the estate of CLIFFORD ARRICK, deceased.
No. 88.

To the Supreme Court of the United States.

Your petitioner respectfully represents:

1. That he is the plaintiff in error in the above-entitled case.

2. That until within a week he believed that a citation in proper form had been served on W. D. Davidge, esq., one of the attorneys of record in the court below of the defendant in that court, and that evidence of such service appeared in the record in this case; but that a few days ago Mr. Davidge called his attention to the fact that no evidence of service of citation appears in the record in this court, and stated that he, said Davidge, did not feel authorized to appear in the absence of such service.

3. That your petitioner is informed and believes, and therefore avers, that said Davidge had notice of the taking out of the writ of error and the filing of the appeal bond in this case, and acted as attorney for the defendant below in the matter of the approval of that bond.

4. That this case, and the case which immediately precedes it on the docket of this court, involve in large part the same subject-matter and the same questions of law; that the writs of error in both were sued out on the same

day—September 3, 1880; that a citation is annexed to each writ; that the appeal bonds in the two cases are signed by the same surety and were approved by the same judge on the same day; that a copy of the writ of error and citation in each case was lodged in the clerk's office of the court below on the same day—September 3, 1880; and that the records were filed in this court together on the 11th day of October, 1880. Mr. Davidge was of counsel for the defendants in each case, and your petitioner is the plaintiff in error in both cases. Service of the citation in case No. 87 was acknowledged by said Davidge on the 2d day of October, 1880, and in this case, as in the other, he signified in writing on the appeal bond his satisfaction with the surety on the appeal bond.

Wherefore your petitioner believes that said Davidge had notice of the taking out of the writ of error in this case as in the other; in further evidence of which he appends hereto the affidavit of Mr. A. S. Worthington, who, as attorney for the petitioner in both cases, had charge of the taking out of the writ of error in both cases, and also a certificate of the clerk of the court of the Supreme Court of the District of Columbia.

Your petitioner therefore prays that it may be adjudged that the defendant in error has had sufficient notice of the suing out of the writ of error in this case; that a reasonable time may be allowed the petitioner thereafter to prepare for the argument of the case, or that he may have relief in such other form as to the court shall seem meet.

NATH'L WILSON.

Subscribed and sworn to before me this 25th day of October, 1883.

R. J. MEIGS, *Clerk*,
By J. JAY CAMP, *Ass't Clerk*.

To W. D. DAVIDGE, ESQ.,
Attorney for the Defendant in Error:

Take notice that I shall call up the foregoing petition at the opening of the court on Monday, October 29, 1883, or as soon thereafter as counsel can be heard, unless the case shall be reached before that time on the call of the docket, in which event I shall present the matter to the court when the case is reached.

Take notice, also, that in support of the prayer of this petition I shall refer the court to the cases named below.

A. S. WORTHINGTON,
Attorney for the Plaintiff in Error.

Innerarity *v.* Byrne, 5 How., 295.
Buckingham *v.* McLean, 13 How., 150.
United States *v.* Gomez, 1 Wall., 690.
Bigler *v.* Waller, 12 Wall., 142.

In the Supreme Court of the United States. October Term, 1883.

NATHANIEL WILSON, administrator, &c., of HORATIO AMES'S estate,
vs.
JOSEPHINE C. ARRICK, administratrix of estate of CLIFFORD ARRICK, deceased. } No. 88.

I, Augustus S. Worthington, on oath say that as one of the attorneys of record of the plaintiff in this case in the court below, and as his attorney in the case which immediately precedes it on the docket of this court, I had charge of the matter of removing those causes to this court after the adverse decision of the court below.

While the clerk of the court below was preparing under my direction the records in the two cases in question, I saw W. D. Davidge, esq., who was the principal counsel for the successful party in both cases, and informed him that the writs of error had been sued out and that the records

were preparing, and added that before filing the records in this court I should submit them to him in order that he might see whether anything was omitted that he wished to have go into them. Mr. Davidge thereupon said to me to go on and prepare the records myself, and added that he would trust to my honor in the matter, and that he wanted me to be very careful and see that he was protected.

Upon receiving from the clerk of this court a short time ago the printed records in these two cases I immediately began the preparation of a brief in No. 37, and while so engaged a few days ago had my attention called to the fact that in this case there is no evidence in the record of the service of the citation, and was at the same time informed that Mr. Davidge does not feel authorized to appear in the case for the defendant in error. I immediately, in person, by examination of papers and by inquiry of persons connected with my office and those connected with my client's office, made an effort to ascertain the facts connected with the suing out of the writs of error in this case, which had, and have still, entirely escaped my memory. I continued this investigation till the 24th day of October, 1883, when I found upon the original appeal bond in this case (now on file in the office of the clerk of the Supreme Court of the District of Columbia) the following memorandum written in pencil: "I consider the above security ample, W. D. Davidge," which memorandum is in the handwriting of said W. D. Davidge, and the signature is his, as I verily believe, and I am well acquainted with his handwriting.

It was not until this day that I recalled the conversation with Mr. Davidge related in this affidavit, but having recollected it my memory is clear and distinct on the subject.

AUGUSTUS S. WORTHINGTON.

Sworn to and subscribed before me this 25th day of October, A. D. 1883.

EWELL A. DICK,
Notary Public.

[SEAL.]

In the Supreme Court of the United States, October Term, 1883.

NATHANIEL WILSON, administrator d. b. n. of the estate of HORATIO AMES,
vs.
JOSEPHINE C. ARRICK, administratrix of the estate of CLIFFORD ARRICK.
No. 88.

I hereby certify that the original appeal bond in this case, a copy of which appears upon pages 31 and 32 of the printed record, is on file in my office, and that at the bottom thereof is a memorandum in pencil in the following words:

"I consider the above security ample. W. D. Davidge."

I further certify that the docket entries in this case in my office show that a copy of the writ of error in this case was lodged in my office on the 3d day of September, 1880, and that the printed forms then and now used by me contain a writ of error and citation on the same page, as shown on pages 30 and 31 of the printed record in this case.

Witness my hand and the seal of the Supreme Court of the District of Columbia this 25th day of October, 1883.

[SEAL.] R. J. MEIGS, *Clerk.*

Service of copies of the foregoing notice, petition, affidavit, and certificate acknowledged this 25th day of October, 1883.